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Final Report of the Commission Expert Group on European Insurance Contract Law

The information and views set out in this report are those of the members of the Expert Group and do not necessarily reflect the official opinion of the Commission.

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Executive Summary

1. This report examines the impact of differences between national contract laws on cross-border insurance business under the freedom to provide services and the freedom of establishment. The mandate of the Expert Group[1] is to carry out an analysis in order to assist the Commission in examining whether differences in contract laws pose an obstacle to cross-border trade in insurance products. It does not relate to other differences which may influence cross-border insurance business. Nevertheless, the report recognises the significance of such other differences; some of them are of a factual, economic and social nature, others relate to areas of the law different from contract law, in particular to prudential regulation and taxation. These differences include: 'knowing your customer', understanding the true risk proposed for cover, language, culture, including expectations of the local policyholder, the need for local claims handling, the form and prevalence of frauds, the tax and labour law environment, the legal, regulatory and supervisory environment, and cross-border redress options. The members of the Group were drawing on their professional knowledge and expertise and were not considering statistical evidence except where explicitly mentioned.

2. Two approaches to handle this task have been adopted: The first starting from the differences in insurance contract law in general, i.e. without specifying any classes of insurance[2]; the second focusing on particular classes: life insurance[3], liability insurance[4], and motor insurance.[5]

3. With regard to large risks, the cross-border provision of insurance cover is already now a common occurrence; it rarely encounters obstacles arising from differences in insurance contract law since the parties are free to choose the applicable law.

4. By contrast, the law applicable to mass risk insurance can be chosen only in limited situations. Rome I calls for the application of the law of the Member State in which the risk is situated which in most cases of mass risk insurance is the Member State in which the policyholder is habitually resident. The legislator has adopted this system in order to protect the weaker party.

5. Where the law applicable to the contract differs from that of the insurer's country of origin which has served as the basis for the design of the contract and is mandatory, the contract, its marketing, and/or its administration by IT, call centres and legal departments will need adaptation. Differences in national mandatory rules may restrict the freedom of the insurer to provide its services cross border (and may thus form obstacles); such rules are important to protect European citizens as consumers or for example as victims of road accidents. These differences raise the costs of cross-border trade in insurance. These effects have been highlighted with regard to a number of rules governing several aspects of cross-border insurance contracts, for example pre-contractual duties, formalities of contracting, precautionary measures, the unfairness control of standard contract terms, and duration and renewal of policies.

6. Life insurance displays a great variety of types and functions. For some of them, especially pensions, tax law and social security regulations supersede insurance contract law as the principal source of regulation. Other life insurances are similar to financial instruments. In this context, divergent rules on pre-contractual information duties (which are particularly important for

1 OJ 2013 C 16/6.

2 See below paras. 4-193

3 See below paras. 194-234

4 See below paras. 235 - 280

5 See below paras. 281 - 313

consumers' confidence in cross-border trade) and on the calculation of surrender values were identified as highly relevant for cross-border life insurance. Differences in other rules relate to the withdrawal period, the consequences of cancellation, the drafting of questionnaires, the payment of premium and the insurance money, and to termination. They have the effect of increasing legal uncertainty and complexity, and of raising costs of cross-border activities. How insurers manage these requirements is a business decision driven by their commercial approach and attitude to risk.

7. The legal framework of liability insurance is particularly complex due to the involvement of third parties, the interrelation with liability law, and the variety of duties to insure imposed by national legislation or regulation. While it is not easy to isolate issues of pure insurance contract law, a number of legal divergences have been identified as causing costs and uncertainty. This notably applies to the various differences concerning compulsory insurances, to rules on the mitigation of loss, in particular on the cover of legal expenses incurred for the defence and on the time-span of the insurer's liability. The applicable rules on insurance contract law are only one element in the decision to offer cross-border liability cover alongside others; they do not appear to be the main element.

8. Motor liability insurance is compulsory under Dir. 2009/103/EC and one of the most widely spread insurances in Europe. Various specific features such as driving habits or liability regimes exist. Despite a basic harmonisation, differences between the relevant national contract laws subsist and raise the costs of entering a foreign market. These differences concern in particular specific punitive interest rates in the case of non-payment by the insurer, the reimbursement of legal expenses, the compulsory nature of Bonus/Malus systems in a few Member States, certain requirements as to the form and proof of motor liability insurance, the duty to accept risks and to submit offers to applicants, and the review of premium adjustment clauses under standards of unfairness.

Introduction

1. By Commission Decision of 17 January 2013 an Expert Group on European Insurance Contract Law was set up[6]. According to this Decision, the Expert Group's task was "to carry out an analysis in order to assist the Commission in examining whether differences in contract laws pose an obstacle to cross-border trade in insurance products"[7]. Where the Expert Group would find that such differences pose the said obstacles, it was further called upon to "identify the insurance areas which are likely to be particularly affected by such obstacles"[8]. The background of this decision emerges from its recitals. The mandate of the group was thus confined to contract law, thereby excluding an enquiry into divergences in other areas of the law which might equally influence cross-border insurance. The Expert Group has not carried out a detailed analysis of the borderline areas between contract law and other areas of law.

2. The 20 members of the Expert Group[9], coming from a dozen of Member States, are of diverse occupational experience: the majority are practitioners representing various groups interested in insurance operations: life and non-life insurers, the users of insurance products, both from business and consumers, intermediaries, legal practitioners, and some are academics. To the extent that members were not appointed in their personal capacity, their respective organizations were represented by other persons in some of the meetings. The members of the Group were drawing on their professional knowledge and expertise and were not considering statistical evidence except where explicitly mentioned.

3. The Expert Group was convened for ten meetings in 2013 and 2014. The meetings were prepared by the European Commission which drafted discussion papers serving as a basis for the debate within the Expert Group. The present report resulted from these discussions and was drafted by members of the Expert Group. Its Chapters 1 and 2 are devoted to general aspects of the topic, in particular to the economic aspects and to the legal framework. Chapter 3 deals with the impact of insurance contract law rules on cross-border insurance business in general. Chapters 4, 5 and 6 take a closer look at specific branches of insurance, namely the areas of life insurance, liability insurance, and motor insurance. The Expert Group chose these sectors because there the impact of differences between national insurance contract laws on cross-border business may be especially perceptible and these branches deserve particular attention in view of their economic significance for the internal market.

6Commission Decision of 17 January 2013 an Expert Group on a European Insurance Contract Law, OJ 2013 C 16/6 (Commission Decision).

7Commission Decision, Art.2(1).

8Commission Decision, Art.2(2).

9 See Annex 1

Chapter I: Economic Facts and General Framework

Section 1: State of play of cross-border insurance in the EU

a) Statistics

4. Three generations of insurance directives[10] have substantially facilitated the cross-border operation of insurance companies within the EU over the past 40 years[11]. Data indicates that the market share of foreign controlled undertakings and branches or agencies of such undertakings in overall EU primary insurance has almost doubled respectively from 19% to 37%[12] between 2000 and 2009. The top large EU insurance companies are more active internationally in comparison to the top 15 US insurers[13] who are much more focused on domestic sales in the US. The Single Market and further liberalisation of trade in insurance services is critical for the maintenance of the competitive position of the top EU insurers in the global market.

5. Cross-border activity has significantly developed by way of mergers and acquisitions (M&As). For instance, in the area of third party motor liability insurance (M3PL) 344 M&As, both domestic and cross-border, took place within the 27 EU Member States over the period of 1999-2008. With regard to M3PL the number of cross-border M&A transactions involving a company headquartered in another EU Member State is significant with just under 30% of the total M&As in the EU 27[14]. The acquiring companies have mainly been based in well-developed insurance markets, such as France, Austria, Germany, the UK, Spain, the Netherlands, Denmark and Belgium. While large and well developed markets, such as those mentioned above have been major destinations for mergers and acquisitions in the EU, a significant number of cross-border transactions have also targeted Central and Eastern European countries[15].

6. Cross-border insurance sales[16], on the basis of freedom to provide services and branches however represented only 4.10% of total gross premiums written in the EU in 2007[17]. This low level of cross-border activity does not reflect cross-border activity from specific Member States; certain jurisdictions such as Ireland and Luxembourg appear more export oriented from the insurer's perspective. On the other hand, in most Member States the percentage of total gross premiums written cross-border will be tiny compared to their domestic activity. The volume of exported insurance products (by means of established branches and free provision of services) in terms of gross written premiums in the EU amounted to 42.8 billion EUR in 2007 respectively with 33.2 billion EUR accounting for life insurance and 9.6 billion EUR for non-life[18].

7. The Expert Group approached the statistical data with some caution on the basis that data can be collected in different ways and for different purposes; thus data is not always comprehensive or

10 See below para. 68

11 The Treaty on the Functioning of the European Union (OJ 2012 C 326) prohibits restrictions on the freedom of establishment and freedom to provide services (Articles 49 and 56).The provisions of the Consolidated Life Directive 2002/83/EC, to be incorporated into the Solvency II Directive 2009/138/EC permit the taking up of activities covered by the Directives subject to prior official authorisation. Authorisation permits insurance undertakings to carry on business in the entire Community under either the right of establishment or freedom to provide services. Conditions relating to the right of establishment include notification by the insurance undertaking that it proposes to establish a branch within a territory of another Member State.

12 European Financial Stability and Integration Report 2011 p.93.

13 Presentation by Lloyds of 26 October 2012: "Insurance Regulation: International Horizons": http://www.lloyds.com/the-market/communications/events/past-events/uk/insurance-regulators/new-horizons-audio/session-1-introduction - see from 17.48 minutes onwards. According to the presentation less than 10% of the business (premiums) of the top 15 US insurers came from outside the US. Among the top EU insurers Allianz and Axa carry out 78% of their business internationally, Generali carries out 61% of its business internationally and Lloyd's of London carries out over 80% of its business internationally.

14 Retail Insurance Market Study, Final Report by Europe Economics, 26. 11. 2009, p.15.

15 Retail Insurance Market Study, Final Report by Europe Economics, 26. 11. 2009, p.16.

16 Excluding reinsurance.

17 Impact assessment accompanying The White Paper on Insurance Guarantee schemes, SEC 2010(828), p. 17.

18 Impact Assessment accompanying The White Paper on Insurance Guarantee Schemes, SEC 2010 (828), p.17.

comparable due to the different methods and questions used in each study. Some statistics in relation to freedom of establishment include the operation of branches alone, while others only include subsidiaries and agencies. The discrepancy may give rise to a different basis for the calculation of the figures. For instance, if a foreign owned company (following a merger or acquisition) is considered as operating on a cross-border basis the share of cross-border activity would be substantially higher.

8. Both data and assumptions were used by the experts in their deliberations. Where no data was available, certain conclusions were drawn by the experts in this report based on reasonable assumptions and the experts' experience. For instance this was particularly the case in assessing future demand for insurance contracts which relies on future needs and is based on, and limited by, future market conditions and the opportunities which may exist.

b) The 'cross-border insurance contract'

9. Insurance is, broadly, a transfer of the economic consequences of a materialization of risk in return for a payment of premium. Member States have different definitions of an insurance contract. The contract terms will reflect the risk and market conditions. The two fundamental freedoms of establishment and free provision of services should be treated on an equal footing for the purposes of the definition of 'cross-border activity' allowed within the internal market. Thus, contracts sold on either a freedom of services or a freedom of establishment basis are accepted as being part of the scope of the Expert Group's work.

10. Whilst the scope of the experts' deliberations is to consider 'cross-border insurance contracts', a contract may not apparently be a 'cross-border contract' from the insured's perspective. When an insurance contract is sold on the basis of either freedom of establishment or services it will usually be received by the insured in his country of residence, complying with the general good and according to the applicable law of that country, i.e. the host state unless a different law applies[19].

11. It is generally accepted that a 'cross-border' insurance contract is a contract concluded between an insurer whose domicile is in a different Member State from that of the insured. But 'cross-border' activity could also cover situations in which both the insurer and the policyholder were located in the same country but the risk was located in another one, for example a second home or a car licenced in a Member State other than that of the policyholder's habitual residence. Further cases of 'cross-border' activity can result from the involvement of foreign insurance intermediaries. Finally, the scenario of 'fly-to-buy', where a consumer would stay in the insurer's country only in the short term (i.e. is not habitually resident) but approaches an insurer in that country to insure a risk in another Member State, may also be a 'cross-border insurance contract'. Within Europe this model could only be feasible for freedom of services scenarios where the insurer is authorised in the country in which the European citizen is habitually resident, i.e. a consumer could not 'shop around' in Europe to find an insurance contract because s/he could only be sold a contract by insurers who are authorised to do so in his/her country of residence. It is not known the extent of such demand.

12. Some insurance products provide cover for domestic activities and also for activities carried out in other countries, for example household insurance of the type offered in the UK or motor insurance. Whilst these products typically have geographical limitations it may be possible for a home owner who has household insurance to continue to benefit from the private liability insurance coverage included in the household insurance whilst staying away from his/her home in another Member State for a period of time. Similarly cars insured in a Member State can be driven to another Member State. Civil liability arising from an accident in that other State will be covered by

19 See below para. 77 ff.

motor liability insurance[20]. Experts were reluctant to conclude that domestic insurance which may include temporary cross-border cover meant that cross-border insurance was being carried out. Consequently, legal rules and contract clauses restricting that temporary cover cannot be considered as obstacles to cross-border trade for the purposes of the Expert Group's mandate.

13. In the case of large risks there are often a number of parties to the contract, parties who are established in different countries and subject to the laws of those jurisdictions. The subscribing parties would often choose one applicable law for the whole insurance contract. Except for the case of credit insurance, marine and transport insurance, the question whether the risk is a large risk does not only depend on the product itself but on different criteria (i.e. balance sheet total, net turnover and number of employees). Cross-border insurance of large risks is not uncommon. For instance, the MAT (Maritime, Aviation, Transport) insurance for large ships (damage and liability), aircraft (damage and liability) and goods in transit is commonly traded cross-border for EU and non-EU risks and is often based on the same insurance policy forms whatever the risk's origin; the main market that provides this type of insurance is in the UK, the Lloyd's market. Such products often have to be individually determined for each customer. For the use of cross-border products the calculation of the risk may have to be adjusted. In addition, cross border sales require suitable operational and administrative support.

14. The classification of a contract as an 'insurance' contract depends on the laws of the Member States, and disputes can arise where insurance contract laws, tax laws etc. diverge. For example if a person moves to Spain with an investment-linked insurance contract his/her investment choices may render the contract as being excluded from the definition of an insurance contract under Spanish law. In Germany a 'UK style' investment-linked life insurance bond may not be treated as a life insurance contract for tax purposes. Personal pension products also face significant challenges for recognition in 'host' Member States due to the fact that they are formed in response to specific national pension frameworks and tax systems. These significant barriers which stop cross-border trade "shape" the contract terms but they are often not barriers caused by insurance contract laws.

Section 2: Scenarios for cross-border insurance

a) Cross-border supply

15. Cross-border insurance can be considered from both the supply and the demand side. Insurers may wish to explore market opportunities beyond those already available and sell their products in another Member State. Whether they embark upon this road is primarily a business judgment; they will take into consideration all possible circumstances[21]. But they may experience difficulty and uncertainty in doing so, both with regard to the legal and non-legal factors. For example identifying exactly what the general good requirements are in a Member State (which must be complied with) can be problematic. Such obstacles are often not of a contract law nature but will in practice "shape" the contract terms, for example regulatory and tax issues[22]. According to analysis[23], in general cross-border insurance provision is mostly driven by the availability of supply-side resources, by the size of the destination market (and hence opportunity) and by geographical distance. The ability for intermediaries to provide advice on a cross-border basis can also affect supply. The Insurance Mediation Directive[24] adopted in 2002 also enables insurance intermediaries

20 See Art. 3 (3)(a) of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (codified version), OJ 2009 L 263/11.

21 Some of these circumstances rather disincentivise insurers, others encourage them to enter foreign markets, see below paras. 45 ff.

22 See above para. 14.

23 Retail Insurance Market Study (2009) by Europe Economics for the EC: para 3.19, p. 37

24 Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, OJ 2003 L 9/3.

on the basis of their registration in their home Member State to do business in other EU Member States by way of freedom to provide services or by establishing a branch.

16. In respect of consumer scenarios, establishment currently plays a greater role in cross-border supply than the cross-border free provision of services. Establishment includes branches which operate on the 'single passport' basis, which are authorised and regulated by the 'home state' regulator, and subsidiaries of group companies whose head office is in another Member State. An illustration is provided by the very competitive German motor insurance market which operates with more than 100 insurance providers some of which are subsidiaries of foreign-owned companies. Whilst some insurers may choose to form an establishment for practical operational reasons others may perceive advantages in operating on a freedom of services basis which could deliver shorter market entry timeframes and cause lower costs. Still others choose to operate on a freedom of services basis to begin with and then expand to form an establishment over a period of time. Despite the Commission's interpretive communication[25] there is still a lack of clarity between where the freedom of services stops and the freedom of establishment begins for both insurance undertakings and intermediaries. It was however not thought to make any difference to the terms of the contract whether the insurer was operating on a freedom of establishment or a freedom of services basis because, under the present law, the contract which the insured receives must comply with the local general good requirements of the host state either way.

17. Barriers to cross-border trade can have an impact on product innovation. Insurers contemplating to offer new products in more than one Member State must take time to work around differences in, amongst other barriers, the general good rules of the various target markets. They cannot simply offer products in the context of mass risk which have been successful in one Member State to another without adaptation.

18. Three types of factors influencing cross-border supply could be identified: (1) commercial considerations (based on insurers' ability and willingness to insure risks - these depend, amongst other things, on an insurer's understanding of the risks and ability to collate relevant statistical data for the underwriting process, where relevant, its risk appetite and its ability to obtain reinsurance cover); (2) the impact of contract law differences leading to adaptations in contracts and calculation of new prices; and (3) the impact of various other factors including regulatory differences (e.g. tax law or supervisory regulation). A review of the local market requirements in relation to all the matters referred to above is a necessary and inevitable part of an insurer entering a new market. An examination of the differences in national insurance contract laws is only a small part of such review and such differences may be only of minor significance.

b) Consumers' cross-border demand

19. The state of development and sophistication of markets and the extent to which insurance products have penetrated the markets in each individual Member State will have a bearing on demand. There is a significant difference between 'EU 15' and 'EU 13' Member States.

20. Consumer demand is typically reactive and based on those products available to them. They are more likely to stay with products and an insurance market they are familiar with. Evidence from consumer surveys indicates that only 1% of consumers said they had purchased life insurance products cross-border from a different Member State and 1% said they purchased other insurance products from a different Member State, which is a tiny percentage actively seeking insurance from another country[26]. The survey, which was made from a base size of 8202 holders of life insurance products and 13682 non-life insurance products was considered to be sufficient for analysis at EU

25 Commission Interpretive Communication – Freedom to provide services and the general good in the insurance sector, OJ 2000 C43/5 at 7 et seq.

26 Special Eurobarometer 373 – 'Retail Financial Services 2012, p.28, 33, 34: Only 1% of consumers said that they had purchased insurance products cross-border.

level, but not for individual Member State[27]. Furthermore the survey[28] indicates that 2% of consumers would like to purchase life insurance on a cross-border basis whilst 3% of consumers would like to purchase other insurance from different Member States. There therefore seems to be little evidence of actual appetite for cross-border shopping for insurance products by consumers based on existing survey data. In a Eurobarometer survey conducted in 2005 a similar question was asked. For life insurance a decrease is indicated from 3% in 2005 to 2% in 2011. However, the trend data should also be seen as indicative, not only because the 2012 report states that it should be, but also because between 2005 and 2012 there was an enlargement of the EU.

21. The interpretation of these data differs. Consumers may not be confident purchasing insurance contracts on a cross border basis because they may not have the means, support and appropriate information to do so. Comparison data, including on the price, content of insurance products, the application of cross-border redress systems as well as other relevant information may not be available for consumers to enable them to take informed decisions on whether they can purchase from insurers in other countries and how such offers compare to domestic products. They may also be reluctant to purchase cross border insurance because they may not be confident that they are protected by strong and efficient rights which could be enforced across borders within a solid legal framework applicable to all market players. When consumers move to another Member State, an insurer may refuse to renew an insurance policy and direct the insured to obtain fresh insurance locally. This may partly be a commercial issue and a difficulty in rating a risk in another liability context (e.g. motor claims may produce higher damages in a new country of residence). For the consumer, differences in contract law will usually play only a minor part (or none at all) in their demand for an insurance contract.

22. A different interpretation of the data points to the existence of a 'latent' demand. Demand is often driven by supply and is product-led. Many firms may wish to test a market anticipating 'latent demand' for insurance products. Although there is little evidence of consumers actively seeking insurance on a cross-border basis insurers appear able to build market share once a product is offered to a consumer on a freedom of establishment/services basis. Latent demand is a potential demand which is not evidenced by statistics or other data, but which occurs and is mobilised when a new product is offered in a given market. Latent demand and its mobilization do not depend on the contract law governing the insurance product, but are rather linked to factors such as the standard of living or cultural closeness. The extent of latent demand for any particular insurance product from Member State to Member State is not known. For example, such latent demand (if it exists) could possibly arise[29] where European citizens, particularly in Central Europe, regularly travel across borders and may culturally and linguistically feel comfortable concluding contracts in a country which they neighbour but are not residents of. For example citizens in the Italian Autonomous Province of Bolzano may have close relations to Austria, Irish citizens to the UK, French citizens in the Alsace region of France may have close relations to Germany; the Danish minority living in northern Germany may maintain close relations with Denmark, the Greek population of Cyprus with Greece, etc.

23. Cross-border demand may also result from cross-border movements of policyholders. Individuals with pension contributions accrued in a personal pension scheme in the UK who are no longer resident in the UK may wish to transfer their personal pension rights to another UK pension insurance contract but cannot do so without the insurer being authorised in the state in which s/he is habitually resident. Similarly a non-British person living in another Member State may wish to purchase an annuity in the UK in respect of UK personal pension contributions s/he acquired while

27 Page 32.

28 Page 32.

29 The group did not have representative statistic data

previously living in the UK. But as s/he is now resident in another Member State s/he is considered to be concluding a contract in the Member State in which s/he is habitually resident[30].

24. A further situation giving rise to cross-border demand is that of cross-border commuters. A person may work in Paris, accruing pension rights in France with a French insurer but live in Belgium and commute to work. This type of consumer demand scenario is likely to increase with the rise of part-time working, compacted hours and cheaper transport. S/he is habitually resident in Belgium and therefore the 'Member State of the commitment' determining the applicable law will be Belgium, where s/he is habitually resident. Regulation (EC) No 593/2008 (Rome I)[31] will allow an agreement on choice of law in some situations, but not in all. The parties can elect to have the insurance contract governed by the law of the policyholder's nationality[32]. But should the person not be a French national Rome I does not provide a solution to this problem. Moreover the choice of the applicable law will not override all pre-contractual requirements.

25. The demand of consumers and business for cross-border insurance can also be triggered by lower prices and this can be particularly relevant where the same currency is used in the countries of insurer and policyholder, allowing a direct comparison of offers from different Member States. Consumers may not be concerned about where the contract is issued or whether the insurer is domiciled in another country if they can secure a cheaper premium. However the premium may not be the most important factor for consideration before entering into an insurance contract. Consumers' preferences differ, and the basis upon which consumers select their insurance providers and the criteria they apply in their product selection remain at the consumer's discretion. In Spain taxi drivers have increasingly taken contracts of insurance for their taxis from Latvian insurers who offer lower premiums. However, Latvian insurers are not part of the fast-settlement-of-claims structure which operates in Spain as there is no such mandatory requirement. Many taxi drivers are allegedly now experiencing long delays when claiming on insurance policies from these insurers, a situation that has a knock-on effect on possible road accident victims.

26. The internet could potentially reach both domestic and foreign markets more easily and faster than with non-internet sales. This could lead to the rapid growth of direct distribution of standardised insurance products. Should insurers have the freedom to develop strategies and to take commercial risks to sell contracts more easily in 'host' states, 'latent' demand, if it exists, may be met. The use of the internet may further facilitate such demand once insurers have a product which meets the needs of businesses and consumers better than those which are offered in the 'host' state, although it should be remembered that an insurance contract is a complex product.

c) Businesses' cross-border demand

27. There is hardly any statistical data on business demand. Regardless of the lack of statistical data, the approximate level of cross-border demand from consumer and business users could differ given their different interests and their different approaches to dealing with risks. The experts were generally of the view that businesses would wish to simplify their insurance arrangements by not having to take out multiple insurance contracts to cover their operations in different Member States; this implies the basic demand for cross-border insurance in respect of some of those risks. Business demand is more pro-active in its nature than consumer demand as business users have to actively consider insurance as part of their risk management processes. With the help of specialist intermediaries business users can tap into the international market.

30 Directive 2002/83/EC, Article 32.

31 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6.

32 See below para. 72ff.

28. Professional liability insurance for commercial risks was identified as an area where there may possibly be some increased demand. Insurers may be unable or unwilling to cover any cross-border element of a professional activity despite demand. For example the possible gaps in insurance coverage in some Member States may hinder the exercise of cross-border activities for lawyers, since compulsory professional indemnity is generally required for lawyers' activities in most EU Member States. It was recognised that there may be a number of reasons for refusal of cover which may be unrelated to contract law, for example regulatory, risk and the diverging national liability rules. Differences in contract law may therefore be only part of the many elements which require to be checked and evaluated when offering and issuing a cross-border insurance contract for professional liability and a relatively minor factor compared with the challenges posed by other obstacles. Insurance providers confirm this can be due to factors such as local professional bar requirements, different legal and regulatory systems, diverse national general best practice rules, cultural practices that are specific to each jurisdiction and potential language barriers. The diverging national liability rules are an important obstacle[33].

29. Despite there being hardly any statistical data, there may be business demand for sophisticated products not available in all countries. The insurance market in certain Member States may not have developed sufficiently to meet the demands due to development and innovation (for example cloud computing). An example is provided by the decennial insurance of constructors[34]. It is possible that in these circumstances the need for insurance can only be met by insurance companies in other Member States where that insurance market has developed. Such insurance provision can be accessed with the assistance of insurance intermediaries.

d) Compulsory insurance and cross-border demand

30. The demand for insurance may be voluntary, but can also arise as a consequence of obligations to insure created by public authorities: by the EU, by Member States, by their sub-units or by bodies acting under delegated powers. Authorities may, for policy reasons seek to safeguard the interests of consumers, businesses or third parties by requiring certain categories of persons to take out insurance against specific risks. This is referred to as compulsory insurance. Legal provisions establishing a duty to insure will often detail the compulsory content and extent of the cover prescribed. The most common examples of compulsory insurance include liability risks, in particular in respect of motor vehicles, aviation, ships and some independent professions, e.g. lawyers and architects.

31. The number and type of compulsory insurance requirements differ substantially from country to country. In Spain there are around 400 cases of compulsory insurance, for example liability for bullfighting and for owners of dangerous dogs, while in France there are around 100, in Poland 40 and in Germany, at the federal level, only around 30. In some instances Member States create schemes because private insurance cover is not available (for instance, where insurers are unable to cover the risk due to a lack of statistical data to perform the underwriting process and determine the risk proposed or an inability to obtain reinsurance cover). This can happen, for example, in relation to disaster recovery. The demand for such insurances is imposed by government and arises for political reasons although it is met by the conclusion of private insurance contracts.

32. In most cases compulsory insurance is imposed at the national or sub-national level. The domestic insurers within the respective Member State will usually offer products adjusted to the compulsory insurance requirements. Where businesses and consumers want to comply with the local insurance requirements by purchasing cover from foreign insurers they may however encounter difficulties.

33 For details see below chapter V, paras. 242-244.

34 See below para. 33.

33. For example in Belgium and Italy there is a requirement for decennial insurance in construction which is relatively new and the products available are adjusted to the Belgian and Italian liability laws respectively. These products do however not meet all the requirements of the laws in France where for example an Italian constructor wants to carry out its activities. Some French insurers offer a solution consisting in a stand-alone decennial insurance cover to foreign constructors which complies with the requirements of French law; cover is available regardless of the home state of the policyholder[35]. Another solution may be the offer, by the home liability insurers of Italian construction companies, to include the liability risks arising on construction sites in France into the Italian policies. The result is the need for an adaptation of the Italian liability insurance contract to the obligation imposed by French law to take out decennial liability insurance in accordance with French law. It is of course more difficult to put into effect the second solution for insurers from Member States where builders have no duty to provide a ten years' guarantee; insurers from such Member States will usually not offer products matching such guarantees. Consequently builders, especially SME's carrying out the construction business in foreign countries only occasionally, will be confined to the first solution that arguably is more expensive.

34. On a more general note it can be said that, when a professional provides services or exercises its activity within the EU on a cross-border basis, two solutions are possible for the provision of professional liability insurance cover in such a situation:

(1) Either the insurer from the home Member State follows his professional customer and, expanding cover to the host Member State, adapts the insurance contract to the conditions of new business abroad; or

(2) the insurer, for whatever reason, cannot follow the service provider/professional customer into the host Member State. In this case the customer might get the needed cover by a local partner insurer the domestic insurer works together with in such cases or he will have to take out, perhaps with the help of an intermediary, a second liability insurance that meets the requirements imposed by the host state.

35. Compulsory insurance requirements could be considered to be barriers to trade. This applies to both the duty to insure as such and to requirements concerning the extent of cover and conditions of contract imposed by the respective legal provisions.

e) Large risks and cross-border insurance

36. In the market for large risks the supply of, and demand for, cross-border insurance is not impeded by contract law. Here, choice-of-law clauses tend to be negotiated allowing the insurer to have risks located in various States being governed by one and the same law. The level of demand for mass and large risks differs as mass risks are typically consumer-related and large risks are typically industry-related. Nevertheless it was also recognised that even large risks are subject to the overriding mandatory rules of Member States[36].

Section 3: Insurance products addressing cross-border demand

a) Types of products with a cross-border dimension

37. The discussions of the Expert Group focussed on the current role of the following products, whether they could meet the needs of future demand in cross-border insurance trade as well as their future potential:

35 In the past some foreign construction companies had difficulty securing insurance. Foreign builders took their own liability insurance with them but some builders ignored the mandatory requirements for 'decennial insurance' in France and French citizens experienced loss due to the lack of insurance liability of their foreign builder. A number of initiatives have been adopted to avoid this through the activities of the FFSA in France.

36 Arts.7(2) and 9(2) Rome I

(1) Products developed for the domestic market, which could be offered on a cross-border basis without adaptations;
(2) Products with features specifically designed to cover activities of a cross-border nature;
(3) Pan-European products developed for multiple EU countries which can be marketed cross-border without adaptations;
(4) "Follow-your customer products" which could be used by customers when they move to another country on the basis of the same contract (with possible adaptations of the premium).
It is difficult to provide data on areas for future product development because such strategies concern commercially sensitive data. The future demand from businesses is even less certain than for consumers.

38. Cross-border sale of products without any adaptations is virtually limited to large risks or in business-to-business cases where there is a choice of law. Many large risks placed in the co-insurance market are individually tailored and negotiated to meet customer needs, with a professional intermediary involved in advising the (re)insured and placing the contract. In all other cases where choice of law is restricted the terms and conditions of products developed for the domestic market have to be adapted to the local laws and regulatory regimes of the policyholder. For instance in the case of complex life products, compliance with domestic laws in relation to surplus participation and surrender values would render it impossible to offer the same product without contractual adaptations. Investment-linked life insurance contracts may be complex from an investment perspective but this does not mean that simple term life insurance contracts are easier than investment-linked contracts to be sold on a cross-border basis as the 'International Bond'[37] market demonstrates. For example, one German insurer has in the past acknowledged openly that they choose not to offer life policies to residents in other EU countries due to differences in law including contract laws[38]. A choice not to offer insurance is often due to other factors such as tax and regulatory issues.

39. Products specifically designed for cross-border activities and the risks involved include several kinds of travel insurance. For instance, in the UK the majority of travel insurers offer pan-European coverage, while in Belgium the five biggest insurers offer household insurance the civil liability element of which has no geographical limitations in Europe. National contracts can in certain circumstances adapt to the needs of policyholders, for example all insurers in the French market in the case of 'multi-risk home insurance' include civil liability coverage for a property which may be rented out with France.

40. Pan-European products are available for the cover of certain large risks, e.g. the carrier's liability under the Convention on the Contract for the International Carriage of Goods by Road (CMR)[39]. Outside the area of large risks, there is very little data on pan-European products available. Even if a product could have pan-European coverage the product would still have to be tailored to each market where it was offered.

41. There have also been industry initiatives to develop products on a follow-your-customer basis. Thus, when moving, consumers would take the product with them (on the basis of it being the same contract) with possible modifications of the premium to account for the difference in risk. Some professional users such as lawyers in respect of professional liability insurance have also favoured the development of 'portable products.

37 Insurers typically operating out of Ireland and the Isle of Man selling investment-linked life insurance contracts to, for example UK residents.

38 Leander Loacker, Insurance soft law? Anton K. Snyder, ed., Internationales Forum zum Privatversicherungsrecht 2008, Zurich 2009, p.27-48. At p.40 the author cites the web-site of a German insurance company (CosmosDirekt), a standard answer given to applicants who are habitually resident outside of Germany.

b) Adaptation of contracts

42. Regardless of whether an insurer was operating on either a freedom of establishment or freedom of services basis, mass insurance products are transformed and adapted when they are sold on a 'cross-border basis'. Such transformation is a cost to insurance businesses and if passed on to customers, it is a cost to them. The features of insurance contracts have to be adapted for each host state to comply with 'general good' and mandatory requirements and if they are not adapted insurers still have to take advice as to whether they need to be adapted. Such contract adaptations may be required for reasons other than contract law. Even if an insurer wishes to sell to nationals who choose the law of the Member State of which s/he is a national when they are living in another European Member State the insurer has to consider the general good and adapt the contract because the insured will be protected by the laws within the Member State of the commitment. Some pre-contractual requirements in the Member State of the commitment would also still have to be complied with. The approach for the mass market can be distinguished for large risks because adaptation of contracts for large risks could be for commercial reasons to meet the parties' needs.

43. A further factor requiring the adaptation of contracts is taxation. The differences between Member States' tax laws have a significant bearing on the portability of insurance pension contracts and form the main obstacle, which cannot be ignored, for cross-border pensions. The design of national pension systems may require complementary pension products to contain certain features (i.e. capital guarantees, coverage of biometric risk)[40].

44. There is evidence of products offering cross-border features for the domestic market. In many cases such products require an adaptation of products sold in other Member States.

Section 4: Reasons, other than insurance contract law, for the level of cross-border trade in insurance

a) Survey

45. From an insurer's perspective, a number of commercial and practical factors are of high (or even primary) importance, when determining whether to start cross-border activity. An incentive to go abroad may be the low level of insurance penetration in a foreign country or the weak intensity of competition in its market, both increasing the likelihood of profitable business. But there are other important circumstances to be taken into account. They include legal and non-legal factors: understanding the true risk proposed for cover; the reluctance to invest in building a brand in the target market; the costs of IT systems and of a reliable service network; cultural features as well as sensitivities and expectations; tax laws (particularly for life insurance and pensions); differences in the legal framework; the regulatory environment and supervision; pre-contractual and 'know-your-customer' rules; the liability laws in the target market; the 'risk appetite' of the insurer, variations in the prevalence and form of insurance frauds; knowledge of local languages; the need for a local presence; the redress mechanisms required to be available in Member States (e.g. the Financial Ombudsman Service in the UK which applies its own standards of fairness); maintenance of a long-term relationship throughout the duration of the contract being an important element of the claims management system[41]. These factors all have an impact on the product design, on the true risk to be assumed and on the start-up costs in the new market. Some of them will be explained in greater detail below. Their weight may vary according to the characteristics of the relevant branch, product and the countries involved.

40 Such issues will be further considered below in chapter IV, paras. 228-233.

b) Commercial considerations related to the nature of insurance

46. Insurance contracts are offered and purchased within an environment affected by commercial and legal factors. Alongside differences in contract law other important and inextricably linked non-contractual barriers exist to prevent cross-border trade in insurance contracts and would still hinder trade even if differences in contract laws did not pose any obstacles. Contract law was viewed as a minor barrier, if a barrier at all, by a number of experts.

47. The insurance contract which an insurer is willing to offer depends on the level of risk it is willing and able to accept and the insurer's ability to rate and price the risk. Insurance is a private contract which generally involves the insurer agreeing to take on a risk in exchange for a premium. For some risks, there may be no insurers willing or able to provide cover because the risks are too big relative to the potential premium which policyholders would be willing to pay. Alternatively the insurer may not be able to purchase reinsurance cover, or the establishment of an appropriate infrastructure or network to manage claims efficiently may simply be too costly or cumbersome. For other risks there are many insurers willing and able to provide cover. Without a proper appreciation of the risks to be assumed an insurer will not be able to price the product appropriately and may therefore inadvertently compromise its solvency and long term survival which would not be in the best interests of consumers. On the other hand the Block Exemption Regulation[42] facilitates entry of new competitors on a national market by giving them access to joint compilations, tables and studies.

48. Unlike the purchase of a tangible good, such as a pair of shoes where the product remains the same wherever it is sold, the insurance 'product' involves the purchase of contractual rights and obligations which the insurer may wish to alter, amongst other things, according to its 'risk appetite' (resulting for example from actuarial studies, prudential rules, financial capacity, knowledge of the risks) and the conditions of the national target market. Availability of local statistical data helps to develop actuarial models underpinning the underwriting process for the calculation of premiums.

49. Commercial reasoning may explain the non-availability of cover for both compulsory and voluntary insurance on a cross-border basis. Insurers may view the risks as being disproportionately high and may have difficulty assessing the risk. Where risks differ between countries, differentials in prices may arise due to other reasons than differences in the laws of the countries involved.

50. The insurance contract is therefore a reflection of the risk (the anticipated claims frequency and the anticipated claims severity) and the 'risk appetite' of the insurer in question. The level of risk which is tolerable will, amongst other things, depend on the insurer's equity and on market conditions, in particular the intensity of competition and the profit outlook. Those market conditions will shape the nature of the insurance.

c) Taxation

51. One of the most significant factors impacting cross-border life insurance is tax. Differences in taxation produce an unequal playing field for providers. This is particularly the case for life insurance pension contracts (the features of which are characterised by the tax legislation in the insurer's home state) and investment-linked life insurance. Tax incentives offered in each member state also play a significant role in generating demand. In the UK demand can be evidenced for cross-border trade in response to tax benefits relating to a gross roll-up of income tax where tax is 'rolled' over from year to year until the benefits under the contract are exercised when the tax is

42 Commission Regulation No 267/2010 on the application of Article 101(3) of TFEU to certain categories of agreements, decisions and concerted practices in the insurance sector

then paid. This has contributed to the 'international bond' market where insurance products are sold on a cross-border basis to persons resident in the UK[43].

d) Distribution and after-sales services

52. When entering a foreign market, an insurer must take a decision about how it wants to organize its presence in the target market. This is important for the acquisition of business, but also for the later contact with a policyholder after the conclusion of the contract, e.g. in the case an insured event occurs. For customers the insurer's presence is also an important point.

53. At the pre-sales stage intermediaries have traditionally played the main role in the distribution of insurance policies. But they often avoid advising on foreign insurance mass risks products due to liability risks and/or due to a lack of knowledge of foreign laws. This problem can be avoided where a product is sold directly, particularly if the contract is concluded 'on-line' which is increasingly often the case with standardized products. But insurers may not wish to sell products on a direct sales basis where advice is particularly important to ensure the customer understands the terms and conditions (or benefits and risks) of the product. This may be the case, for example, with more complex investment-linked insurance contracts and insurance pensions contracts.

54. After-sales services in relation to a cross-border insurance contract also play an important role in both product distribution and competition. Not all types of intermediaries are able to offer after-sales services for products developed on the basis of another law or under the authority of another regulator. This is a particular problem if the insured's intermediary is not authorised to carry on business in the jurisdiction to which the insured's contract is submitted. For direct sales where products are not intermediary-led or for the development of internet sales, after-sales obstacles could present a barrier to market development and trade.

e) Legal and regulatory reasons other than insurance contract law

55. The overriding mandatory rules of each Member State cannot be derogated from which underlines a significant difficulty for the development of cross-border trade. For example in France it is not compulsory to insure against fire or other natural events, but if such insurance is taken out it is mandatory to add cover for natural catastrophes and terrorism. In particular, the law[44] regulates the amount of the additional premium for the compulsory insurance against the effects of natural disasters. This premium is 12% of the fire insurance. A part of this additional premium is paid to a natural risk prevention fund. Thus, a foreign insurer contemplating to enter the French fire insurance market with policies governed by the insurer's home law would have to take into account the said rules in any event.

56. There are several other significant obstacles to the introduction of a pan-European pension plan, including pre-contractual information, the requirements of regulators and each national pension system[45]. Differences in social and labour law were singled out as legal areas with a relevance to pensions and for insurance pension contracts the wider 'general good' will also have to be complied with in accordance with the Consolidated Life Directive[46].

57. National liability regimes are an area of relevance to non-life insurance, in particular liability insurance.

43 Further aspects of the impact of tax law will be discussed below in chapter IV, paras. 229-230.

44 Article L 125-1 du Code des assurances.

45 See Paper issued by the European Financial Services Round Table entitled 'Pan-European Pension Plans, From Concept to Action' June 2007; http://www.efr.be/documents%5Cpublication%5C76309EPP%202007.pdf

46 Directive 2002/83/EC.

58. It was observed that in all lines of insurance, companies may be dissuaded from offering certain products on a 'cross-border basis' following informal contacts with supervisory authorities. Whilst insurance companies are not legally obliged to submit their products to the supervisory authorities in EU countries, they may choose to do so due to uncertainties as to what constitutes the 'general good' and mandatory requirements in a host state. Simply establishing what the host state requirements are and negotiating compliance with the host state authorities is difficult. This could lead to an uncertain process for the insurers which may result in them being dissuaded from entering the market should the supervisory authorities comment and engage in the informal process. Pension products may also find additional regulatory hurdles as they may require regulation by a second supervisory authority.

f) The factors as obstacles

59. As pointed out before[47] factors all have an impact on the product design, the true risk to be assumed by the insurer and on costs. Many small to medium companies are likely to be hindered from starting cross-border activities just for the factors mentioned above, irrespective of insurance contract law. Market entry costs can be high for insurers in the European Union to enter the insurance market of another Member State. However, costs can be lower if distribution of a product is through an arrangement made with an intermediary and that intermediary has the relevant expertise relating to the product's design. Smaller companies are hindered from starting cross-border business not only due to lack of resources but also due to the lack of know-how and due to the lack of local market data and knowledge to be able to adequately assess risks. Small and medium-sized businesses may however deliberately decide against cross-border activities in order to focus on the local market and not necessarily because of the lack of resources, etc. Larger companies may bear larger costs due to their size, processes and 'risk appetites' when developing products for new markets. The experts recognised the importance of all these factors for cross-border trade. However, the mandate of the Expert Group and the scope of this report are limited to considering whether differences in insurance contract laws pose an obstacle to the cross-border provision of insurance and, if so, the areas of insurance most affected.

Section 5: Differences in insurance contract law – some specific examples

60. The following examples provide a flavour of the type of issues and contractual problems faced in the exercise of cross-border insurance and are examined in greater detail in further chapters of this report.

61. Where an insurance contract has been validly concluded in a domestic setting, neither insurer nor insured can presently be confident that their contract will remain valid when they travel to another Member State. This is the case particularly where there may be a variation in a contract which would have been effective if it had been made before the person moved/travelled and which violates certain mandatory provisions of the law in the country to which the insured moves. For example, a non-British person who has purchased a single premium UK investment-linked life insurance contract may wish to live in Germany. S/he then wishes to make an additional ad hoc payment which was not contemplated by the original contract. Whether this constitutes a simple amendment of the old contract or gives rise to a new one depends on the applicable law which may now be German law. Thus there is uncertainty surrounding such a scenario. For example, could the additional premium trigger any disclosure requirements if it is to be considered to be part of a new contract? If regulatory changes affecting the insurer require amendment to the contract, would that trigger general good requirements?

47 See para. 45.

62. In certain Member States the distinction between 'primary contract law', 'regulatory law' and 'soft law' is an important consideration. Regulatory laws include provisions laid down by supervisory authorities; soft laws are surrounding provisions contained e.g. in codes of conduct established by business associations that impact insurance product design and formalities. Such elements of the overall framework may act as obstacles to cross-border sales. For example in Italy automatic renewal clauses allowed in other Member States are not permitted in car insurance but the Italian Supervisory Authority issued guidance about how insurers manage renewal.

63. The fairness of terms can be interpreted differently on both the European and national level. Liability insurance based on the so-called 'claims-made principle' where the presentation of a claim against an insured person must be made during the insured period may become part of a contract governed by German law. But where the clause inflicts serious disadvantages on the policyholder the German courts may hold this principle void[48]. The German court did not classify the claims-made clause as being exempted from judicial review under Article 4(2) Unfair Contract Terms Directive[49] which provides that "assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration …"[50]. This is in line with the view expressed by the German Bundesgerichtshof and the Austrian Oberster Gerichshof which both have held that exclusion clauses do not relate to the main subject matter of the contract[51]. However other jurisdictions treat exclusion clauses as core terms immunized against judicial review; this can for example be the case in England and Scotland[52]. An English or Scottish insurance policy may therefore be invalid in Germany and Austria even although it is lawfully distributed in the UK[53].

64. There are different rules on warranties and disclosures throughout Europe and these have a bearing on the contract terms. Under German law if a contractual warranty is breached the insurer will only be exempt from liability if the breach was committed with gross negligence, any claim would be reduced in accordance with the degree of fault. This would not necessarily be anticipated by firms operating on a cross-border basis which may expect to rely on such a warranty. The English and Scottish legal position has recently changed[54] with regard to consumer disclosures; the standard of utmost good faith which consumers were previously expected to maintain has been amended. When entering into an insurance contract unprompted declarations made by a consumer can no longer form a basis of the contract and the insurer is expected to make clear and specific enquiries rather than expecting the consumer to reveal all relevant facts without being asked.

65. In respect of profit participation, the German legislator tried to avoid any conflict in the German Insurance Contract Act 2008[55] with the freedom to provide services and the right of establishment of foreign insurers. Therefore it allowed an exclusion of profit participation of the policyholder *in toto*. If however an insurer gives profit participation it must also include to a certain extent so-called 'hidden reserves'[56]. According to the statutory materials[57] this may create a barrier for a

48 OLG München 8 May 2009, case no. U 5136/08; Versicherungsrecht 2009, 1066-1071.

49Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. OJ 1993 L 95/29.

50 Please note that the original proposal for the directive on unfair contract terms would have provided for a standardised EU wide solution as it did not include an exemption of the definition of the main subject matter of the contract.

51 A decision on the point is BGH 20 July 2011, case no. IV ZR 291/10, BeckRS 20249, para.41.

52 English case: Bankers Insurance Company Limited v South [2004] Lloyds Rep. IR.1, an exception to cover was held to be a core term.

53 Please note that some changes in the treatment of unfair contract terms, contained in the Consumer Rights Bill are currently being considered by the UK Parliament for enactment.

54 Consumer Insurance (Disclosure and Representations) Act 2012 c. 6. The law on warranties for both consumers and business customers may change in 2015, bringing the UK more in line with other EU MS' law on warranties. Review of law on warranties for insurance contracts: expected to be part of a draft Bill in 2014: http://lawcommission.justice.gov.uk/consultations/business_disclosure.html Consumer Insurance (Disclosure and Representations) Act 2012 c. 6.

55 Section 153(1) VVG

56 Section 153(3) VVG.

57 Deutscher Bundestag, Drucksache 16/3945 of 20th December 2006, Draft Insurance Contract Act of the German Government, page 96.

cross-border selling of foreign with-profits policies but the restriction of the freedom to provide services was justified by the general good.

66. The differing treatment of surrender values which must be paid in the case of early termination present problems in a number of jurisdictions. In France[58] personalised information on surrender values for the first 8 years of a life insurance contract is required to be provided to the insured. In Germany foreign insurers are permitted to calculate surrender values on the basis of values used in the insurer's home state[59]. Such different approaches mean insurers must alter their contractual terms in each Member State.

67. In the Netherlands an individual can save for an additional third pillar pension. Under certain conditions the contribution is deductible and the annuities are taxed. The Dutch tax law penalizes the pay-out of a lump sum by a high taxation rate[60]. If the policyholder moves residence to another Member State and retires there, according to Dutch law s/he would have to convert his accrued pension capital into an annuity. However, according to the Dutch Central Bank, the conversion into an annuity is a new legal agreement and not the continuation of the old contract. For the insurance provider this means that they would be considered as conducting cross-border activity and would for instance need a notification and ensure compliance with general good rules of the country where the policyholder is resident. Thus, the company may not wish to offer the new contract in the form of an annuity. Consequently the policyholder would be confronted with a major fiscal claim. S/he would have to pay up to 72% taxes and fines to the Dutch authorities. The existing Directives do not preserve the rights under existing insurance contracts including contracts which are varied when European citizens change their habitual residence within Europe[61]. The position would be similar in the UK where the conversion of a pension into an annuity is also a new legal agreement.

58 The proposal or contract must include a specimen letter in a prescribed form for exercise of cancellation rights (and additional wording provided for under secondary regulations). The proposal or insurance contract must also include a surrender value table covering the first eight years of the contract together with the amount of premiums paid during these years, minimal values and information regarding calculation of surrender values where these are not available initially (i.e. in unit-linked contracts), Article L 132-5-2 Code des assurances.

59 Section 169 (3) VVG.

60 In Germany, the situation is comparable for certain products where tax reliefs are granted in case of an annuity but not in case of the payout of a lump sum.

61 Rome I Regulation (EC) No 593/2008; Consolidated Life Directive 2002/82/EC.

Chapter II: EU Law and Differences between national insurance contract laws

Section 1: The existing EU legal framework

a) Substantive law

68. A large body of substantive European insurance law has been created by EU secondary legislation. Directive 2009/138/EC (Solvency II)[62], which recasts and repeals thirteen existing Directives, covers mainly aspects of supervisory law. It also harmonises certain aspects of insurance contract law in Title II (Arts. 178 to 211 providing "Specific Provisions for Insurance and Reinsurance"), such as information duties of the insurer (Arts. 183 to 185), the cancellation period in individual life insurance Art. 186) and the free choice of a lawyer guaranteed and qualified in Arts. 201 and 202. These rules still allow Member States to increase the level of policyholder's protection: Under the conditions set by Art. 185(7), Member States may impose additional information requirements and Art. 186(1) allows Member States to provide for a cancellation period somewhere between 14 and 30 days.

69. Directive 2009/103/EC (Motor Insurance)[63] contains further rules relating to contract law such as the minimum amounts covered (Art. 9), the direct right of action (Art. 18) and exclusion clauses (Art. 13). Also, Directive 2002/92/EC (Insurance Mediation)[64] may have an impact on the contractual relationship between an insurer and its customer whenever an insurer is vicariously liable for a breach of duty committed by an agent, e.g. an inaccurate instruction on the contents of a particular product. Moreover, current proposals for a new Insurance Mediation Directive (IMD II)[65], for a new Directive on Markets in Financial Instruments (MiFID II)[66] as well as for a Regulation on Key Information Documents for Investment Products (PRIPs Regulation)[67] provide for special rules on insurance contracts which are investment instruments, such as funds-linked life insurance. Specific duties to inform and to advise customers, which would apply not only to intermediaries but also to insurers, are proposed.

70. Moreover, insurance contract law is harmonised to a certain degree by directives on consumer contract law covering consumer insurances. Mention is to be made of Directive 2002/65/EC (Distance Marketing of Financial Services)[68] and Council Directive 93/13/EEC (Unfair Contract Terms)[69]. Council Directive 93/13/EEC (see Art. 8) and some of the provisions in Directive 2002/65/EC concerning information duties (see Art. 4(2)) provide EU minimum standards of consumer protection and allow Member States to adopt more protective measures.

71. Other directives outside the scope of consumer protection, such as the Directive 2000/31/EC (Electronic Commerce)[70], Directive 2011/7/EU (Late Payment)[71], Directive 95/46/EC (Data

62 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), OJ 2009 L 335/1.

63 Directive 2009/103/EC of 16 September 2009 of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (codified version), OJ 2009 L 263/11.

64 Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, OJ 2003 L 9/3.

65 Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast), COM (2012) 360 final.

66 Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast), COM (2011) 656 final.

67 Proposal for a Regulation of the European Parliament and of the Council on key information documents for investment products, COM (2012) 352 final.

68 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC, OJ 2002 L 271/16.

69 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

70 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 2000 L 178/1.

Protection)[72] and Directive 2004/113/EC (Gender Equality)[73] also have an impact on insurance contract law. Human rights as guaranteed by the ECHR and national constitutional laws may also have an impact on national insurance contract law, for instance on disclosure duties imposed by medical questionnaires[74].

b) Private international law

i) Mass risks

72. Private international law on matters relating to insurance has largely been unified by Regulation (EC) No 44/2001 (Brussels I)[75], Regulation (EC) No 593/2008 (Rome I) and Regulation (EC) No 864/2007 (Rome II)[76]. Put in a nutshell, these Regulations create the following framework for cross-border provision of insurance services: Brussels I allows policyholders to bring actions against an insurer in the courts of their domicile, thereby subjecting insurers to foreign jurisdiction[77]. Deviating jurisdiction clauses are only valid in specific cases, among them in large risk insurance[78]. Rome I calls for the application of the law of the Member State in which the risk is situated which in most cases of mass risk insurance is the Member State in which the policyholder is habitually resident.[79]The legislator has adopted this system in order to protect the weaker party. The parties' choice of law is not free; instead it is limited to a comprehensive list of a very few choices[80]. Member States are, however, permitted to provide for a broader freedom of choice of law[81].

73. Thus, in mass risk insurance, an insurer providing its services cross-border will be exposed to the application of foreign law in most cases while this rule means for the consumer that he can rely on the his home country law. However, at the same time, this can lead to a situation preventing consumer insurance, for example on divorce, a Greek father might want to take out a UK life insurance contract to provide a £sterling sum payable on his death to provide support, education etc. for his children resident in the UK with their mother. In this example the Greek father would only be able to purchase a contract from a UK insurer authorised to carry on such insurance business in Greece, he could not for example do so directly from Greece with a firm providing insurance for UK risks (either on-line or by other means) since UK insurers would not offer life insurance governed by Greek law. Neither could he 'fly-to-buy' the insurance from the UK as he is habitually resident in Greece which would dictate the law of the contract. Other reasons, such as market considerations, or the preference of intermediaries may also lead to the application of local law.

71 Directive 2011/7/EU of 16 February 2011 of the European Parliament and of the Council on combating late payment in commercial transactions (recast), OJ 2011 L 48/1.

72 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.

73Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37.

74 Belgian Constitutional Court judgement 166/2011 of 10 November 2011.

75 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1; to be replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1.

76 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/40.

77 See Art. 9(1) lit. b Brussels I.

78 See Art. 13 (5) in connection with Art. 14(5) Brussels I.

79 Third subparagraph of Article 7(3) Rome I; the situation differs in insurance of immovable property, insurance of licensed vehicles and travel insurance.

80 First subparagraph of Art. 7(3) Rome I.

81 See, in detail, second subparagraph of Art. 7(3) Rome I.

ii) Large risks

74. In contrast, large risk insurance is subject to the law of the country where the insurer has its habitual place of residence[82]. Moreover, parties enjoy free choice of law[83]. Nevertheless, internationally mandatory rules according to Art. 9 Rome I and rules on compulsory insurance according to Art. 7(4) Rome I affect the free choice of the parties on specific points in those cases. The parties accept that the choice of law will carry the consequences of the application of local mandatory law.

iii) Review of Rome I

75. Art. 27 Rome I provides that "By 17 June 2013, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If appropriate, the report shall be accompanied by proposals to amend this Regulation. The report shall include: (a) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any;".

Section 2: The impact of national insurance contract law

a) Protection of policyholders as an overriding public interest

76. EU insurance law as presented above leaves most issues of insurance contract law to national legislation. National rules of insurance contract law often prevent parties to opt out (mandatory rules) or to deviate to the detriment of the policyholder (semi-mandatory rules). While such mandatory or semi-mandatory rules may restrict the freedom of the insurer to provide its services cross border (and may thus form obstacles), such rules are important to protect European citizens as consumers or for example victims of road accidents. The European Court of Justice has held in its judgment of 4th December 1986, that "the insurance sector is a particularly sensitive area from the point of view of the protection of the consumer both as a policy-holder and as an insured person"[84] and that "there are imperative reasons relating to the public interest which may justify restrictions on the freedom to provide services, provided, however, that the rules of the State of establishment are not adequate in order to achieve the necessary level of protection and that the requirements of the State in which the service is provided do not exceed what is necessary in that respect."[85]

b) Choice of law as exercised by the parties in large risk insurance

77. The option in favour of a free choice of law as provided in Art. 7(2) Rome I is exercised very frequently in large risk insurance business. The parties will choose a law which gives them certainty, allows tailor-made solutions for the policyholder or is simply considered to be neutral from the perspective of the parties to the contract. Overall, a decision to offer insurance services cross-border will not depend so much on the law applicable, even though it may come to play an important role at a later stage (e.g. during dispute litigation or arbitration).

78. The choice of law can be made in favour of the law of the insurer, i.e. the law of the state where the insurer has its habitual residence, of the law of the state where the risk is situated or where the policyholder has its habitual place of residence, of the law of the competent court or court of arbitration (thereby avoiding costs of applying foreign law)or of the law as selected by the

82Second sentence of the second subparagraph of Art. 7(2) Rome I.

83First subparagraph of Art. 7(3) Rome I.

84 ECJ 4th December 1986, Case 205/84, Commission v. Germany, no. 30.

85 ECJ 4th December 1986, Case 205/84, Commission v. Germany, no. 33.

parties for other reasons (for example, certainty or being amenable to tailor-made solutions, as mentioned above).

79. The parties will usually make an appropriate choice of law where there are international co-insurance arrangements and/or international insurance programs (for example, master policies and local policies and/or, possibly, several layers of liability under direct insurance and reinsurance arrangements, and/or fronting constructions). Some of these constructions, as e.g. fronting agreements, are means to circumvent restrictions on the provision of insurance services cross-border. Choice of a foreign law has its implications on the insurance policy: for instance, where an English insurer is asked to underwrite a transport risk under German law, it ought to be aware that German law prohibits clauses of promissory warranties exempting the insurer from its obligation to pay insurance money without negligence on the part of the policyholder even in transport insurance which is a large risk. Moreover, even in large risk insurance a free choice of law will be restricted by Art. 9 Rome I (mandatory rules) as well as Art. 7(4) Rome I (compulsory insurance).

80. Difficulties can arise, irrespective of the applicable law, as a result of the different approaches taken by different courts, arbitral tribunals and alternative methods of dispute resolution; and minimising such difficulties is one reason for the parties to agree a particular choice of law and dispute resolution procedure in a large risk insurance programme.

c) Impact of national mandatory rules applicable to mass risk insurance

81. The situation in mass risk insurance is worse than in large risk insurance. As demonstrated EU private international law limits a free choice of law and calls for the application of the law of the Member State in which the risk is situated, usually the habitual place of residence of the policyholder, for the sake of policyholders' protection. While the application of mandatory national insurance contract law is important in order to ensure the protection of the weaker party, and considering that policyholders will (and should) choose a particular product not merely for its low price, the limitation placed on a free choice of law forces insurers to adapt their insurance contracts to the local law. Entering foreign markets generates various kinds of costs. The costs generated by the required adjustments to foreign mandatory contract laws are part of these overall costs. This factor may prevent insurers from using their freedom to provide services to enter foreign insurance markets, at least if it is only on an occasional basis. At the same time, it may prevent customers from shopping for foreign products, making insurance markets inaccessible to "active" foreign customers. For example, insurers offering their services online usually reject applications from abroad. While a number of factors may be the reason for this behaviour, becoming submitted to foreign mandatory contract law and foreign jurisdiction may be an important one.

82. A group of potentially "active" consumers are cross-border commuters, for instance a German national who buys a house and starts living in Belgium but continues working in Germany. This German may want to finance the acquisition of the house through a loan to be granted by his/her German bank and secure the loan by taking out insurance for the residual debt in case of an accident or illness[86] with a German insurer. Faced with the application of Belgian law and the jurisdiction of Belgian courts, the German insurer may, however, refuse to provide cover. The same applies if a Belgian lives and works in Germany for his/her entire life, but decides to move back to Belgium (or to move on to any other EU country) upon retirement. This Belgian person may be much more familiar with the German insurance market than with the Belgian or any other market in the EU. However, faced with the application of Belgian (or another Member State's) law and the jurisdiction of Belgian (or another Member State's) courts, the German insurer may refuse to provide cover. The German insurer may even prefer to terminate existing contracts or at least refuse to alter them, because an alteration could be considered a new contract and, thus, subject

86 The situation is different in life insurance where Art. 7 (3)(c) Rome I allows a choice of the law of the Member State of which the policyholder is a national.

the insurer to foreign law. These examples illustrate that policyholders will not only be excluded from or severely restricted in shopping in foreign markets, but sometimes also from keeping existing insurance contracts when moving abroad. It has to be noted, that it will not suffice if policyholders who move to another country retain a postal address in their home countries for instance with relatives or friends taking care of their mail.

83. Limitation of free choice of law may also pose an obstacle for insurance of “expatriates”. While they may be a profitable target group for insurers offering specialised insurance contracts, for instance “expat life insurance”, the insurer will not be able to subject all its contracts with expatriates to one and the same law due to Art. 7(3) Rome I limiting free choice of law in mass risk insurance. There is, of course, a choice of law option in life insurance allowing for the application of the law of the Member State of which the policyholder is a citizen. However, this allows application of the same law only to contracts with expatriates holding the same citizenship.

84. The prospect of being subject to the jurisdiction of foreign courts and application of foreign law, as demonstrated, may not stop an insurer from entering a targeted foreign market strategically – either by providing its services cross-border or by establishing itself abroad. However, the penetration of a foreign market will require both insurance products and the administration of insurance contracts, which regularly establish a long term relationship with the policyholder, to be adapted to the new regime, leading to legal (and other) costs for the insurer and consequently for the customer. Products which are construed and calculated in accordance with the actuarial principles applied in the insurer’s home Member State may have to be recalculated, amongst other things, in line with the contract law requirements of the target market. Insurers are prevented from building up a European pool of risks. The costs may well deter an insurer from doing business in all of the EU or EEA Member States, because the legal costs will multiply in correlation with the number of jurisdictions within the EU/EEA. In any event, legal costs make it less attractive and less efficient to enter foreign markets. This applies in particular to insurance because the complexity of mandatory law in this field always leaves a certain degree of uncertainty as to the effects of foreign law on a given insurance product.

d) Compulsory insurance

85. Compulsory insurance requirements with which parties must comply by virtue of Art. 7(4) Rome I can provide obstacles to the cross-border provision of insurance due to their mandatory nature[87]. Such requirements, which are frequently found in the area of liability insurance, are sometimes established by EU law (most notably in Art. 3 Motor Vehicle Liability Insurance Directive), but more usually by national law. The number of compulsory insurance schemes varies drastically among Member States[88]. National rules also vary considerably in substance. Typically, rules on compulsory insurance extend beyond a duty to take out insurance as such, but also establish requirements for an insured sum, specific elements of the cover, the availability and effect of exclusion clauses, deductibles, etc.

86. Clearly, insurance products need to be adapted to the law of the Member State imposing compulsory insurance (see Art. 7(4) Rome I). Sometimes, as is the case with motor vehicle liability insurance in Italy, insurers are even compelled to offer model policies (“basic insurance cover”) as an alternative to specific products offered in the market[89]. Adaptation of the product is accompanied by changes in the administration of insurance contracts, in particular in the IT system. It follows that little cross-border activity is to be observed in areas of compulsory insurance, such

87 Moreover, Member States may require that a compulsory insurance contract is not only subject to the specific provisions establishing the insurance requirement, but to the law of the Member State imposing the duty to insure in its entirety; see Art. 7(4)(b) Rome I.

88 See above para. 31.

89 The rule introduced by L.22172013 is not yet fully implemented in Italy

as motor vehicle liability insurance, construction insurance, professional liability insurance and insurance for midwives. Policyholders, e.g. professionals from some Member States, cannot simply take insurance cover with them when providing services in other Member States; they frequently have to conclude local insurance contracts.

Section 3: Relevant rules of (mandatory) insurance contract law

a) Rules having direct influence on the insurance product

87. There are many rules of national law with a direct influence on the insurance product. Rules on compulsory insurance as discussed above[90] form the main example. However, rules with direct influence on the insurance product also exist for non-compulsory insurance. Such rules are often mandatory in favour of the policyholder, irrespective of whether the policyholder is a consumer or a (small or medium-sized) enterprise. Such mandatory rules governing the insurance product may be rules of contract law, rules of supervisory law or rules of tax law. In addition, account must be taken of those institutions offering alternative forms of dispute resolution and their requirements or where these are less specific, such as in the case of the Financial Ombudsman Service in the UK, the approach that they adopt. An example of contract law in the *acquis communautaire* can be found in Art. 201 Solvency II Directive granting policyholders of legal expenses insurance the free choice of a lawyer (with exceptions as stated in Art. 202 Solvency II Directive).

88. In life insurance, product-related mandatory rules are a particular problem for the cross-border provision of services. If an insurer wants to start life insurance business e.g. in Austria or Germany, it will face the application of a series of product related rules. A (statutory or contractual) exclusion clause exempting the insurer from liability in case of suicide committed by the person at risk is usually restricted by mandatory rules which vary in detail: In Germany, the insurer has to pay out insurance money in any event if the person at risk commits suicide more than 3 years after the contract was concluded (Section 161(1) sentence 1 German Insurance Contract Act). Within the first 3 years of the contract term the insurer will only have to pay out insurance money if the person at risk committed suicide in a state of mental incapacity (Section 161(1) sentence 2 German Insurance Contract Act). The latter rule applies in Austria irrespective of the time when suicide is committed (Section 169 Austrian Insurance Contract Act). Furthermore, Section 153 of the German Insurance Contract Act grants policyholders of life insurance contracts a right to participate in profits (including hidden reserves) earned by the insurer. Such profits must be calculated and distributed in the manner prescribed by Section 153 of the German Insurance Contract Act. While the right to participate in profits may be excluded as a whole, modification or exclusion of such right is prohibited under Section 153(1) of the German Insurance Contract Act.

89. Product-related rules apply in other branches of insurance as well. Semi-mandatory Section 63(1) Austrian Insurance Contract Act and Section 83(1) German Insurance Contract Act, applicable to all indemnity insurances, allow policyholders to recover costs of mitigating loss. If such costs have been incurred upon request by the insurer, it has to cover the costs even if such costs exceed the insured sum together with the insurance money. Similarly, an insurer has to cover defence costs in liability insurance, under certain circumstances even beyond the insured sum (Section 150(2) Austrian Insurance Contract Act; Section 101(2) German Insurance Contract Act). In spite of the non-mandatory character of this rule, exclusion or restriction of defence cover is limited by an unfair contract terms control (Sections 305ff German Civil Code; Section 879(3) Austrian Civil Code). Waiting periods, which will be discussed separately[91], form another example.

90 See section 2, subsection d) above.

91 See paras. 131-132.

b) Judicial review of unfair contract terms

90. Among the provisions which affect the insurance product, rules on unfair contract terms have a particular impact, more so on B2C contracts than on B2B contracts. Such rules differ from the product-related mandatory rules described above[92] in that they do not impose specific content, but limit the freedom of the insurer to define the contents of an insurance contract in its general contract terms. Control of unfair terms by national judges may directly affect the insurance product and lead to a distortion of the insurer's calculation of the risk and the corresponding premium. Since insurers subject all or most of their contracts to the same general terms, a court decision holding a term to be unfair will not only have an effect on one particular contract; it will affect the insurer's entire risk pool.

91. In spite of the enactment of the Unfair Contract Terms Directive and because of its minimum harmonisation approach, national approaches differ greatly. In some countries, control is restricted to contracts involving consumers, whereas in others, such a restriction does not apply. English law[93] provides that the description of the insured event ("insurance clause" or "trigger") and exclusion clauses are exempt from unfair terms control, because these rules directly relate to the main subject matter of the contract[94]. In contrast, German law allows for a control of exclusion clauses and even of the definition of the insured event where such definition contains restrictions in the scope of cover (e.g. the use of claims-made policies instead of occurrence-based cover[95]). For example, according to leading commentators, a clause in a life insurance contract excluding cover for a death caused by an illness in existence at the time the contract is concluded will not pass the fairness test, because such exclusion would undermine the protective purposes of the rules on pre-contractual disclosure (Sections 19ff German Insurance Contract Act)[96]. Moreover, other countries, such as Belgium, Denmark, Finland, Luxembourg, Portugal and Spain, submit clauses in general insurance terms to a fairness test even if they directly relate to the main subject matter (scope of cover). Such differences may lead to a situation where an exclusion clause, which is applied validly in one country, may be held void by the court of another country. Clearly, this would force an insurer to adapt and re-calculate its products when entering a foreign market. The same effect would occur where similar national rules, in particular general clauses defining the unfairness of a contract term, are applied differently by national courts. The concepts of the "main subject matter of the contract" and "adequacy of the price" are notions of community law[97], their interpretation by the European Court of Justice may bring closer the interpretation existing in the different Member States.

c) Other rules affecting the insurance product

92. There are other rules of national law which do not govern a specific element of the cover (inclusion or exclusion of certain risks), but nevertheless have an effect on it. National insurance contract laws commonly provide the insurer with an exceptional right to terminate the contract for

92 Section 3.a) above.

93 UK's law on unfair contract terms, specifically the exemption from the fairness test of terms related to the main subject matter, is expected to be amended in 2014. Review of Unfair Contract Terms conducted by the Law Commission of England Scotland and Wales: http://lawcommission.justice.gov.uk/areas/unfair_terms_in_contracts.htm and revision as part of the Consumer Rights Bill – expected adoption as an Act in 2014: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206367/bis-19-925-draft-consumer-rights-bill.pdf

94 See Art. 6(2) of the Unfair Terms in Consumer Contracts Regulations 1999; as to its application to insurance contracts see Clarke, The Law of Insurance Contracts (6th edn, Informa 2009) 19-5A at page 623.

95 As to the position of English and German courts see above para. 63; for German law see also Prölss in Prölss and Martin (eds), Versicherungsvertragsgesetz (28th edn, Beck 2010) Vorbemerkung I para. 58.

96 See Prölss in Prölss and Martin (eds), Versicherungsvertragsgesetz (28th edn, Beck 2010) § 19 para. 77ff.

97 See conclusions of advocate general Trstenjak in the case C-484/08 point 66 to 69

specific reasons or to withhold payment of insurance money. Such rules concern pre-contractual disclosure by the applicant, precautionary measures imposed by contract, aggravation of risk, payment of premium, notification of the insured event, mitigation duties, etc. In the first case (termination), the policyholder will lose his/her insurance contract. In the second case (full or partial discharge of the insurer), the policyholder will lose his/her cover. Depending on the law applicable, the insurer will either have to pay and/or maintain the insurance relationship, as the case may be, which will distort its assumptions on the contract and the conditions for cover, or the policyholder will face a loss of contract and/or cover which might disappoint his/her expectations for a reliable insurance product. In any event, such rules have an effect, albeit an indirect one, on the product itself.

93. Insurance products may also be affected by formal requirements. This is the case whenever an insurance contract, or a specific clause relevant to the design of an insurance product, is held to be void because formal requirements have not been met. For instance, under French law, exclusion clauses must be printed in bold print in a prominent place on the policy (Art. L 112-4 Codes des assurances). Thus, a German insurance policy sold into the French market without adhering to this formal requirement would render any exclusion clauses void. Another example is the requirement under Austrian and German law of obtaining written consent from the person at risk upon whose life a life insurance is taken out (see Section 159(2) Austrian Insurance Contract Act; Section 150(2) German ICA; formal consent requirements also exist in the laws of Member States when a life insurance contract is altered). Thus, a life insurance taken out by a German policyholder upon the life of her German husband with an English insurer may be void under the applicable German law, despite the fact that the wife has an insurable interest in the life of her husband within the meaning of English law. On the other hand, life insurance taken out by an English policyholder upon the life of another Englishman with a German insurer may be void under the applicable English law, because the policyholder may lack an insurable interest in the life of the person at risk, irrespective of the fact that the person at risk has given written consent as required under Section 150(2) German Insurance Contract Act. Finally, the insurance policy may deviate from the application made or any previous agreement. If so, various national laws declare the contents of the policy to constitute the contents of the contract if certain formal requirements are met. For example, a policy edited by the insurer with contents deviating from the application made by the policyholder will be deemed to constitute the parties' agreement under Section 5 German Insurance Contract Act, but only if the insurer has highlighted all the deviations and informed the policyholder of his/her right to reject the policy. If this formality is not observed, the contents of the application made will prevail. This will not be the case in other jurisdictions where there is no such formal requirement.

94. The duties of the insurer to provide pre-contractual information regarding the insurance or even to advise the policyholder may also have an effect on the insurance product. The penalty for breach of such duties is often the extension over years of the policyholder's withdrawal rights and/or damages. If, for instance, an insurer provides information that specific incidents are covered while in fact it does not provide such cover, the insurer may be held liable to put the policyholder in the position s/he would have been in, had the information been correct.

d) Rules on the administration of insurance contracts by insurers

95. Insurance is a contract for the performance of continuing obligations on both sides. Even where the contractual term is only one year, contracts are frequently renewed or extended. Insurance contracts require on-going administration, e.g. invoicing (first and follow-up premium), post-contractual information (among other things on new products), adjustment of terms and premiums, dealing with notifications by the policyholder, aggravations of risk, claims handling and the like. Many of these topics are governed by mandatory rules of insurance contract law in the Member States. Such rules set out formalities, e.g. a requirement to give notice in writing. While electronic

documents fulfil the requirement of writing in some Member States, this is not the case in other Member States. Other rules provide for certain time limits to be observed by the insurer, e.g. for invoking penalties following the discovery of a non-disclosure or misrepresentation, an aggravation of risk or any other fact relevant under the contract. Some Member States impose duties upon the insurer to warn the policyholder at certain instances, e.g. the German Insurance Contract Act obliges the insurer to warn the policyholder about the consequences of any non-disclosure or misrepresentation (Section 19(4)-(5) German Insurance Contract Act), of a breach of a contractual duty to notify and give information on an insured event (Section 28(4) German Insurance Contract Act), of a non-payment of premium (second sentence of Section 37(2) and second sentence of Section 38(1) German Insurance Contract Act), etc. Irrespective of other factors the large number of such mandatory rules and their diversity in different Member States pose a problem for an insurer entering a new market. The complexity of such rules will often prevent an insurer from having the same employees and the same IT system deal with such matters in various jurisdictions. The insurer will have to employ specialists and maintain separate IT systems for each Member State. Again, costs will multiply in correlation with the number of Member States in which an insurer is doing business.

e) In particular: group insurance

96. Group insurance poses questions of its own. It is striking to observe that in spite of its enormous economic relevance only very few legislators (e.g. in Sweden and France) have enacted special rules on group insurance. Under other jurisdiction's laws, including the new German Insurance Contract Act, it is left to the judge to deal with the specific aspects of group insurance. Clearly, national solutions vary significantly. There are also other influences. In Poland, for instance, the supervisory authority discourages, in order to safeguard consumer protection, the use of "bancassurance" products based on group insurances (i.e. group insurances taken out by a bank as policyholder for the bank's customers as insureds). Therefore, any use of group insurance schemes as a tool for marketing insurance products at a European level would still have to be tested as to adverse effects of foreign law on the relationship of the insurer to the group insurance policyholder and individual group members.

Chapter III: The Impact of Differences in Insurance Contract Law Applicable to All Classes of Insurance on Cross-Border Insurance

Section 1: Definition of insurance contract

97. As seen in the previous section, in spite of a limited harmonisation and approximation of insurance contract laws, significant differences remain between Member States. The purpose of this chapter is to assess the extent to which such differences constitute an obstacle for insurers and for consumers when offering or taking insurance contracts on a cross-border basis, the analysis being conducted for each of a number of specific aspects of general insurance contract law.

98. A first illustration of the above is the lack of a meaningful definition of insurance at EU level[98], either as an activity or as a contract. In fact, few Member States have adopted a statutory definition of insurance (e.g. Belgium, the Netherlands[99]). It is generally acknowledged that defining insurance as an activity or as a contract is a perilous task and, arguably, a futile one: by its nature, insurance is closely linked to human activities and is therefore in a constant state of evolution which a fixed definition may hinder. In addition, insurance can be defined differently depending on whether one contemplates the legal relationship (insurer, policyholder, insured and beneficiary), the technical process (the mutualisation of a large number of risks) or even the tax qualification (e.g.: in the case of life insurance or pensions). For instance, in their recent reform of B2C insurance contract law, the English and Scottish Law Commissions decided not to define insurance[100].

99. As such, the main features of insurance contracts often result from case law. For example in France, the *Cour de Cassation*[101] has ruled that an insurance contract has three main characteristics: a risk, defined as a future uncertain event independent from the will of the parties; a premium; and the payment of a sum of money or the performance of an agreed task in case the risk materializes. The notion of *alea*[102], which can be translated as *uncertainty*, is an essential element of the insurance contract and its absence will generally void the contract. In Germany, the insurance contract itself is not legally defined, either. However, the typical obligations arising from an insurance contract are listed[103].

100. One possible area of concern is investment-linked life insurance, as the same contract may qualify as insurance in one Member State and not in another. In that respect, some Member States require a minimum death benefit for the contract to qualify as insurance (either from a legal or from a tax point of view, e.g. Germany), while others (e.g. France[104]) do not. Even within a single Member State, differences can occur in the contract law, tax or supervisory definitions of insurance adding another significant layer of complexity. Indeed, contracts classified as insurance in one Member State may be treated, for example, as a financial or investment product in another for regulatory purposes.

98 Regulation 878/2011 of 2 September 2011 amending Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria does contain a definition of insurance, however considering the context of the Regulation and the drafting of the definition, it is unlikely that such definition could be used for any other purpose. The same can also be found in Regulation 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010.

99 Art. 7:925 Burgerlijk Wetboek (Civil Code).

100 The Law Commission and the Scottish Law Commission, Consumer Insurance Law: Pre-contract disclosure and misrepresentation, December 2009 - http://lawcommission.justice.gov.uk/docs/lc319_Consumer_Insurance_Law.pdf.

101 Cass. Civ. 1, 31 January 1956, N° pourvoi 2306; Published in Bulletin 1956 N° 52

102 Art. 1964 of the French Civil Code.

103 Section 1 German Insurance Contract Act

104 In four decisions of 23 November 2004: Cass. ch.mixte, 23 nov. 2004, no 02-11.352, no 01-13.592, no 03-13.673 and no 02-17.507.

101. Moreover, some contracts may qualify as insurance only when they are offered by an insurance undertaking. This is sometimes the case of warranty extensions for consumer products such as cars or electrical appliances, which may be offered as a paid option by the manufacturer itself or as an insurance contract by the seller. The same seller may therefore be acting as an insurance intermediary when offering the extended warranty as an insurance product, but not if such extended warranty is provided by the manufacturer.

102. In spite of the above, in practice, the qualification of a contract as insurance is rarely an issue for the parties and there is no indication that consumers consider this as a concern from a contract law perspective. Therefore, differences between Member States in the definition of insurance operations, of insurance contracts or of their essential features generally constitute a relatively minor obstacle for insurers as they are able to overcome differences when offering their products on a cross-border basis.

103. For large risks, insurance programmes may contain local policies and higher layers providing coverage on a global or pan-European basis. Only the local policies tend to require any adaptation to meet local definition requirements.

104. Generally, the consensus is that material differences in definitions result either from prudential regulation and supervisory practice or from tax law. The required adaptations and the associated costs are generally minor. For instance, investment-linked life insurance contracts may require a death benefit when offered in some jurisdictions. In such case, insurers may typically provide an additional death benefit expressed as a percentage of the surrender value of the policy. For example, 103% of the surrender value may be paid to the designated beneficiaries in case of death of the life insured, thus adding a 3% mortality risk on top of the pure investment part of the contract. While this affects the actuarial basis on which the contract is designed, insurers have the option of reinsuring all or part of the mortality risk thus mitigating the cost and operational burden of this additional benefit.

Section 2: Elements of the contract: in particular insurable interest

105. One of the elements required for the formation of an insurance contract in many Member States is insurable interest. Depending on the jurisdiction a lack of insurable interest may void the contract. This may have a significant impact on cross-border business. Other elements include for example, with life insurance contracts, the amount of death benefit and for investment-linked life insurance contracts, the amount of investment discretion which the policyholder is allowed or the types of investments which are permitted to be linked to the contract. The necessary elements can also be suggested by tax or regulatory requirements which differ between jurisdictions as well.

106. The definition, requirements and sanctions relating to insurable interest vary significantly across Member States, while European law does not deal with this concept. Insurable interest relates to the definition of an insurance contract as it is considered an essential feature distinguishing it from other contracts such as gambling. Insurable interest also aims at preventing one person from attempting to benefit from another person's loss.

107. Certain laws, such as English and Scottish laws, treat insurable interest as legal element essential for the validity of the insurance contract. The English and Scottish Law Commissions considered this issue[105] and responses are summarised in the introduction to their report[106]. In

105 The Law Commission and Scottish Law Commission, Issues Paper 4, January 2008 http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf.

106 Insurance contract law, Summary of responses to second consultation paper, Insurance Contract Law, Post Contract Duties and other Issues, Chapter 3: Insurable Interest - http://lawcommission.justice.gov.uk/docs/post-contract-duties_responses_insurable-interest.pdf.

essence, the Law Commissions noted a strong support for maintaining the principle of insurable interest during consultations in 2008, adding that it was nevertheless difficult to state what amounts to an insurable interest or to specify the consequences of writing insurance without it.

108. French law has a rather economic approach, simply requiring that the policyholder has *an interest in safeguarding a property or a direct or indirect interest in the non-occurrence of a risk*[107]. In life insurance, the insurance contract will be void unless the insured has given his or her written and express consent[108]. In the Netherlands the insurable interest in indemnity insurance is the compensation of loss or damage. The insurable interest is restricted: the compensation cannot place the insured in a clearly more advantageous position than he would be in without insurance. In life insurance the insurable interest relates to the interest of the beneficiary in the life of the person insured. In Germany, consequences in case of a lack of insured interest are regulated in Section 80 German Insurance Contract Act[109].

109. These differences may, in certain circumstances, require a careful adaptation of insurance contracts but do not seem, by themselves, likely to prevent an insurer from entering another market.

Section 3: The pre-contractual stage

a) Pre-contractual information

110. Pre-contractual information encompasses all the obligations, for the insurer, to provide documents and information relating to the insurance contract prior to its conclusion. A number of European directives have attempted to harmonise certain aspects of pre-contractual information[110] and several initiatives are under way in that respect[111].

111. From an insurance contract law point of view, the pre-contractual stage is of significant importance as it defines the terms of the future contractual relationship. Any irregularity in the pre-contractual information itself or in the manner in which it is provided may therefore impact the parties' respective rights and obligations.

112. In that respect, EU legislation is on a minimum harmonisation basis as seen above[112]. Member States have transposed pre-contractual information requirements in varying manners and many have adopted additional requirements aiming at providing a higher level of protection for consumers, a practice often referred to as *gold-plating*. As a consequence, significant differences in legislation and in case law between Member States exist in terms of pre-contractual information requirements, primarily for B2C contracts. Large risks are less affected by such requirements.

113. For example, the French Insurance Code provides a very detailed set of rules relating to the content and the form of the documents to be provided to the policyholder at the pre-contractual stage[113]. These requirements and their interpretation by the Courts have gained in complexity and lost in clarity over the years, thus generating a significant level of uncertainty for French insurers and even more so for insurers established in other Member States. In case of non-compliance, the

107 Article L. 121-6 of the Insurance Code (applicable to non-life insurance).

108 Article L. 132-2 of the Insurance Code.

109 Section 80(1) German Insurance Contract Act: The policyholder shall not be obligated to pay the insurance premium if no insured interest exists when the insurance cover commences; this shall also apply if the interest does not arise in the case of an insurance taken out for a future enterprise or for another future interest. However, the insurer may demand an appropriate fee.

110 Solvency II Directive 2009/138, Directive 2000/31 on Electronic Commerce, Directive 2002/65 on the Distance Marketing of Financial Services, Insurance Mediation Directive 2002/92 (for intermediaries).

111 E.g.: Packaged Retail Investment Products Regulation and Insurance Mediation Directive 2.

112 See para. 68 ff

113 In particular under Arts. L. 132-5-1, L. 132-5-2, A. 132-4 and A. 132-8.

start of the withdrawal period is deferred until fully compliant information is provided to the policyholder, up to a limit of eight years. This entails that the policyholder may at any time during these eight years request the reimbursement of all the premiums paid, which is typically done in case of poor performance of the assets to which the contract is linked. The French *Cour de Cassation* has adopted a very strict interpretation of these provisions, going as far as to rule that a policyholder may use his or her right of withdrawal even if in bad faith[114]. In practice, in a recent case, the Paris Tribunal ruled that an insurer, by adding a number in front of each separate charge, had breached the requirement whereby all charges should be grouped together in the table to be inserted on the first page of the contract[115].

114. Several insurers established in Luxembourg or Ireland have faced difficulties in applying these provisions to their insurance contracts, in particular because the French Insurance Code is tailored to French contracts[116].

115. Other Member States have also introduced specific requirements. Italy requires insurers to provide a specific formalized note relating to withdrawal rights[117] while in the Netherlands, both the Dutch Central Bank (DNB) and the Netherlands Authority for the Financial Markets (AFM) have introduced distinct rules on transparency and pre-contractual information on costs. In Germany, the national statutory ordinance ("VVG-Info-Verordnung)[118] gives detailed requirements regarding the order of the information provided and itemises the specifications regarding the content.

116. These differences in content, form and sanctions of pre-contractual information rules constitute significant obstacles for insurers as they generate an important level of uncertainty and require constant monitoring. Empirical evidence shows that insurers have renounced penetrating certain markets, in particular the French market, after a careful analysis, considering that the level of additional operational risk generated by legal uncertainty was unacceptable. It is, in fact, difficult to find out what the pre-contractual information requirements in another Member State are without access to a local distribution network or a substantial investment to build up the necessary knowledge.

117. While a cumulative application of requirements from different countries might be contemplated as a solution it is not possible in practice, as there may be conflicting national rules. For instance, different Member States may require highlighting of different parts of information which may be conflicting.

b) Pre-contractual duty of disclosure

118. Precise and accurate information improves the insurer's ability to assess the risk and therefore to price it accordingly. However, several factors may impact the access to such information. Applicants may be reluctant to disclose sensitive or personal information, or may simply not be aware of its relevance to the insurer. They may also be unwilling to disclose specific information in order to avoid the risk of higher cost of insurance. In any case, they may be acting in good or in bad faith.

119. The rules governing the manner in which the applicant to an insurance contract is required to disclose information relevant to the risk to be insured have not been harmonised. As such, these

114 Cass. Civ. 2, 4 February 2010, N° pourvoi 08-21.367, 09-10.311; Not published in Bulletin

115 Tribunal de Grande Instance de Paris, 4th Chamber, 19 October 2010, Répertoire Général 09/5269.

116 For instance, the concept of fonds dédiés which exists under Luxembourg law allowing a more flexible approach to the assets that can be linked to a life insurance contract (pursuant to the Lettre circulaire 08/1 du Commissariat aux Assurances relative aux règles d'investissements pour les produits d'assurance-vie liés à des fonds d'investissement) are almost impossible to reconcile with specific French law requirements to be found under the French Insurance Code, which is only adapted to the French list of admissible assets.

117 Art. 185. lgs. 2097/9/ 2005.

118 Based on Section 7(2) German Insurance Contract Act.

rules vary significantly from one Member State to another, including the sanctions in case of inaccurate or wrongful disclosure. Furthermore, the practise of using questionnaires to obtain the necessary disclosure from applicants is not mandatory in all Member States and the rules relating to allowed questions vary significantly. In Belgium, for instance, questions related to genetic diseases are prohibited[119]. In France, the *Cour de Cassation* has recently ruled that a pre-printed declaration inserted in the insurance contract signed by the policyholder does not constitute a valid pre-contractual questionnaire[120], thus preventing the insurer from relying on such declaration to prove the policyholder's bad faith. In England and Wales, there are currently significant disclosure requirements in a commercial context on the policyholder, which can nevertheless be mitigated by negotiation. However, the burden of disclosure placed on commercial policyholders is being reviewed and may be reformed in the near future. It is generally acknowledged that the issue is more significant for consumer than for commercial contracts. In the Netherlands, if the insurance is placed on the basis of a questionnaire drafted by the insurer, the insurer cannot decline a claim on the basis that facts in respect of which no question was raised were not disclosed, or that the answer to a question couched in general terms was incomplete, unless there was intent to mislead the insurer. A general catch-all question ("Are there any facts or circumstances that may be important to the insurer that you have not mentioned so far?") does not remedy this lack of information. In Germany, the duty of disclosure is established in Section 19 German Insurance Contract Act. However, agreements that deviate from it to the detriment of the policyholder are not permitted[121].

120. Therefore, while there is a perceived convergence of the rules relating to the pre-contractual duties of disclosure, understanding the differences in disclosure requirements in different markets and adapting the products tends to result in added costs which are ultimately born by policyholders. Those differences also preclude online contracting through the use of a single interactive website which would otherwise be possible within the same language area. In addition, disclosure requirements are typically an area where case law is of significant importance, with local insurers having necessarily a better knowledge than those established in other Member States, incurring higher costs for monitoring evolutions in that area.

Section 4: Conclusion of the contract

a) Offer, acceptance and form of the contract

121. Different legal traditions and the absence of harmonisation explain the differences in the manner insurance contracts are concluded across the EU. The essential issue of offer and acceptance is treated differently in each Member State. In general, it will be considered that the applicant is making an offer to the insurer which is free to accept it.[122] Such offer may or may not be binding[123] and some Member States require that the insurer send any contractual documentation prior to any oral contact with the applicant[124], which can be difficult to prove in practice.

119 This prohibition results from Art. 5 of the Loi sur le contrat d'assurance terrestre of 25 June 1992 (as amended). Art. 95 of the same text also excludes genetic tests from medical tests performed for the purpose of taking an insurance contract. For more information on genetic tests, please refer to Section 5 on Chapter IV Life Insurance.

120 Cass. Crim., 10 January 2012, n° 11-81.647.

121 Section 32 German Insurance Contract Act. Section 56 provides additional consequences of a breach of duty of disclosure. Section 157 provides in case of a life insurance contract consequences where the insured person's age has been declared incorrectly. Here, agreements that deviate from it to the detriment of the policyholder are also not permitted, Section 171.

122 E.g. in France, UK, Italy, the Netherlands. In Germany according to Section 5 Insurance Contract Act, deviations from the application contained in the policy shall be deemed to be approved by the policyholder, unless the latter does not object in writing within one month of receipt of the insurance policy. While this deviation from general contract law is also applied in some other Member States (see Article 2:502 PEICL N1), it is not in other member States , for example in Italy (ibid. N8). Insurers from countries applying the rule will have to adjust their contracting procedures when they offer cover in countries such as Italy. This will generate additional costs.

123 E.g. in France, the offer is not binding pursuant to Art. L. 112-2 of the French Insurance Code des assurances, while in Italy it is valid for a period of 15 days only.

124 Information duties are provided in the Code of Private Insurance, in particular Art.183 ff, as well as in IVASS's Regulation no.5/2006 and 35/2010Italy.

122. The specific rules relating to the distance marketing of insurance contracts add much complexity to the rules relating to offer and acceptance. For instance, when marketing its products by telephone, an insurer will typically want to conclude the contract at the end of the call, which may not be possible if the law of the Member State in which the applicant is located requires the latter to return a signed application after the telephone call. Tax law or jurisprudence may also prevent such a distribution method as the intermediary making the telephone call may be treated as a permanent establishment in the host country for tax purposes if the intermediary is allowed to inform the applicant that the contract is concluded at the end of the call[125].

123. Empirical evidence suggests that some supervisors are also extremely inquisitive when contemplating notification requirements for cross-border distribution of insurance contracts by insurers established in other Member States, going as far as requesting a detailed written explanation of the whole underwriting cycle and the production of contractual documents proving that rules on offer and acceptance will be scrupulously complied with.

124. This leads to the second issue relating to the form of the contract. Requirements in this respect vary considerably across Member States. While in some Member States, the existence of a signed written document is a condition for the validity of the insurance contract,[126] others simply require the insurer to provide contractual documents in written form after the conclusion of the contract[127]. The requirement of a signed written document, unless interpreted such as to include electronic communication, impedes online contracting.

125. Other specific insurance contract law provisions may also require the insurer to be able to prove that the policyholder has received, read and accepted the terms of the contract. For instance, the French Insurance Code provides that exclusions may only be enforced if they are printed in very apparent fonts[128], a requirement which has given rise to very detailed case law on font types, colours and weight. This entails that although an oral contract may in theory be valid, a written document is still required for evidential purposes. In Germany, if the content of the insurance policy deviates from the application made by the policyholder or the agreements made, the deviation shall only be deemed to be approved if further preconditions are met and the policyholder does not object in writing within one month of receipt of the insurance policy[129].

126. The same applies to the obligation for insurers to provide the applicable terms and conditions, also referred to as general terms and conditions. Differences between the laws of the Member States exist in terms of content, form and timing of communication.

127. All the differences relating to the conclusion and form of the contract discussed above lead to additional costs in that they require insurers to adapt to very different frameworks. One key source of costs is the obligation to adapt existing IT systems and to ensure that they remain compliant as legislation and case law evolve.

b) Withdrawal period

128. Withdrawal periods are subject to minimum harmonisation in the EU[130] and there are therefore some differences between Member States, especially for mass risks, as such rights are generally not relevant in large risks. In mass risk insurance insurers wanting to engage in cross-border business can avoid difficulties arising from divergent periods under national laws by adopting, whenever possible, the most generous rules in terms of length of the withdrawal period.

125 This appears to be the case in Italy. See also Art.12(3), of IVASS's Reg.34/2010.

126 E.g. Bulgaria, Art.184(1) Insurance Code

127 E.g. the Netherlands, Art.7:932 Burgerlijk Wetboek (Civil Code).

128 Art. L. 112-3 Code des assurances.

129 Section 5(1) German Insurance Contract Act

130 Art.186 of the Solvency II Directive and Art. 6 of the Directive on the Distance Marketing of Financial Services.

They tend to do that also in order to minimise IT costs and because empirical evidence suggests that longer periods do not increase materially the number of withdrawals.

129. But where withdrawal periods are extended over years, the consequences for the cross-border sale of investment-linked insurances will be clearly perceptible and even significant. More precisely, the question is how to treat the premiums paid by the policyholder during the withdrawal period. They may either be held in cash by the insurer (or invested in assets that guarantee the return of the initial investment) or invested in the assets chosen by the policyholder. Insurers will only accept to do the latter if the policyholder has agreed to take the risk of a fall in the value of the assets to which his or her contract is linked, provided of course that the applicable law authorises such an agreement[131].

130. All in all the differences in withdrawal period requirements are not seen as a major obstacle by insurers but the consequences in terms of reimbursement of the premiums paid may require a careful and costly adaptation of the contracts.

c) Waiting periods

131. Waiting periods generally refer to periods during which the policyholder has to pay the premiums and the reinsurer provides cover, such cover being however limited by the exclusion of certain risks for a predetermined period. Waiting periods typically concern health insurance, life insurance (e.g. for suicide) and legal expenses insurance. Some Member States have limited the scope of waiting periods, for instance by prohibiting them in relation to pregnancy[132], while in some others waiting periods are simply illegal[133].

132. While these differences tend to add some elements of complexity to conducting cross-border business, they do not represent a major obstacle for insurers to provide their products on a cross-border basis.

Section 5: Execution of the insurance contract

a) Aggravation of the risk during the contract period

133. As for the pre-contractual duty of disclosure, requirements and sanctions relating to the aggravation of the risk during the contract period vary significantly between Member States. Under English law, ongoing disclosure obligations are purely contractual, whereas other Member States such as France impose an obligation on the policyholder to disclose any new circumstances that either aggravate the risks insured or create new risks[134]. Sanctions also differ, ranging from a reduction of cover to the total loss of cover[135]. These differences can generate complexity and an increased level of uncertainty for insurers doing cross-border business, especially for mass risks.

b) Precautionary measures

134. In addition to the obligation to disclose information relevant to the insurer's risk assessment, policyholders are generally expected to avoid the materialisation of the insured risk or to mitigate its consequences. This obligation is often referred to as *precautionary duties*. From a purely behavioural perspective, the requirement is that the existence of an insurer should not by itself discourage the insured to behave prudently.

131 See also below, Chapter IV, paras. 208, 209, 234.

132 E.g. Belgium: Art.3(2) of the law December 21, 200 7(transposing Art.4.1.a of the directive 2004/113).

133 E.g. Poland: Art. 814 Polish Civil Code regulates that the insurance premium is calculated for the term of the insurer's liability. In practice this means that, according to the opinions expressed in case-law and legal doctrine, the insurer cannot charge premiums for any period when protection is not provided, i.e. the waiting period. The Polish regulatory authorities – UOKiK (Consumers Protection Authority) raised objections to the obligation of a consumer liable to pay an insurance premium for the so-called waiting period, when the insurer does not provide the cover.

134 Article L. 113-2 French Insurance Code.

135 E.g. French Insurance Code, Arts. L. 113-8 (intentional wrongful declaration or non-declaration will generally void the contract) and L. 113-9 (non-intentional wrongful declaration or non-declaration will entail a proportional reduction of cover).

135. The precautionary duties as such will generally be determined by contractual agreement. Legal rules on precautionary duties are not harmonised and the applicable legal frameworks vary among Member States. The main differences lie in the consequences of a breach of such precautionary duties, namely in the need of a causal link between the breach of precautionary duties and the occurrence or aggravation of the risk.

136. The impact of those rules on insurers intending to conduct their business on a cross-border basis is more relevant for mass insurance contracts and in particular with regards to claims management.

Section 6: Unfairness control of standard terms and conditions of insurance contracts

137. The nature of an insurance product is delineated by its terms and conditions. The terms of the insurance policy set out the scope of cover provided and the mechanism by which claims can be made. For mass risks, terms will typically be developed through standard terms and conditions for the relevant market; for large risks this is less so since there is more scope for specific negotiation of the product. But in mass risk insurance, where standard terms and conditions are heavily used, unfairness review plays a significant part in the control of the product which is being sold.

138. Each Member State has developed its own laws for protection against unfair terms. Some of the legal rules which govern unfairness control were developed before the Unfair Contract Terms Directive and were (and remain) broader in scope than the Directive[136]. However, much of the approach of Member States has derived from the Unfair Contract Terms Directive[137]. The Unfair Contract Terms Directive sets out general rules on unfair terms in consumer contracts based on the minimum harmonisation principle. Member States are therefore able to provide higher consumer protection standards in their national laws if they choose to do so. The resulting differences lead to diverging standards of unfairness control in the Member States[138]. There are a number of differing issues which add to the complexity; the Unfair Contract terms Directive does not only apply to insurance contracts, but all consumer contracts.

a) The scope of unfairness control

139. Some Member States have restricted unfairness control to standard terms only; others extend the control to individually negotiated terms[139].

140. According to Art. 3(1) of the Unfair Contract Terms Directive, a contractual term is regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer. This approach has been interpreted differently in Member States with differing interpretations of what causes a significant imbalance in the parties' rights and obligations. The Unfair Contract Terms Directive on its own was insufficient to bring coherence to the rules on unfair contract terms. The policymakers' intention was to provide only for minimum harmonisation, thus enabling Member States some freedom in adopting, maintaining or amending unfairness control in their markets. The Annex to the Unfair Contract Terms Directive provides a list of terms which may be considered unfair in an indicative and non-exhaustive manner. Some Member States have adopted a "grey" list which

136 For example, Portugal and Belgium were cited as examples of states which have developed their unfair terms legislation prior to the introduction of the Directive.

137 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L95 /29.

138 For a comparative overview containing the information on the national laws referred to in this section see for example Hans Schulte-Nölke/Christian Twigg-Flesner/Martin Ebers, eds., EC Consumer Law Compendium, Munich 2008 p.341 et seq. An electronic version of the publication is to be found at: http://www.eu-consumer-law.org/comsumerstudy_part2c_en.pdf. See also the comparative table produced by the Expert Group in the present study.

139 For example: France, Belgium, Sweden, Denmark, Finland, Latvia, Luxembourg, Malta and Slovenia all choose to go beyond the Directive so as to provide unfairness control for individually negotiated terms.

results in the terms not always being unfair[140]; some Member States have put the clauses on a black list and regard them as always unfair[141].

141. The approach adopted across the Member States is further complicated by the approach to "core" terms. Art. 4(2) of the Unfair Contract Terms Directive specifies that an assessment of the unfair nature of the terms will not apply to the main subject matter of the contract or to the adequacy of the price and remuneration of the services supplied in exchange[142].However the Court of Justice[143] has made clear "Member States cannot be prevented from adopting or retaining, throughout the area covered by the Directive, including Art. 4(2) thereof, rules which are more stringent than those provided for by the Directive itself, on condition that they are designed to afford consumers a higher level of protection." For insurance contracts, Recital 19 states that "the terms which clearly define or circumscribe the insured risk and the insurer's liability" do not fall in the scope of the unfairness control "since these restrictions are taken into account in calculating the premium paid by the consumer". The impact of Art. 4(2) on the unfairness review of insurance contracts is however blurred by different language versions of Recital 19[144].

142. A number of Member States have not adopted Art. 4(2); in these Member States terms relating to both the price and delineation of the insured risk are subject to unfairness control[145]. Some of these Member States largely apply the unfairness control to the terms of the insurance policy and exclude only essential elements such as the scope of the insurance cover and the premium[146]. It is not always straightforward to define what is a core term and what is not. A number of other Member States have implemented Art. 4(2) of the Unfair Contract Terms Directive thereby exempting every term which addresses the insured risk and the insurer's liability from the unfairness control[147].

143. Art. 4(2) of the Unfair Contract Terms Directive provides that core terms will only be excluded from the test if they are drafted in "plain and intelligible" language. Art 5, sentence 1 stipulates that standard terms in a written contract should be drafted in plain and intelligible language but does not give any guidelines as to what such language is. Different approaches are adopted in different Member States as to that meaning and in particular as to the level of technical language which can be used. A breach of Art. 5 sentence 1 will lead to the clause being interpreted in favour of a consumer. In at least one Member State[148], however, breach will lead to the clause being void.

144. According to Art. 6(1) of the Unfair Contract Terms Directive, "Member States shall lay down that unfair terms shall not be binding upon the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms". Whereas in some Member States[149] the unfair term can remain in force, in others the unfair term is automatically deemed null and void[150] or non-existent[151]. In some countries the courts may

140 For example, Cyprus, Ireland, Poland, Slovakia and the United Kingdom.

141 For example, Austria, Belgium, Bulgaria, Czech Republic, Estonia, Greece, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovenia and Spain.

142 Please note that some changes are being introduced into United Kingdom law in this field through the Consumer Rights Bill, currently being considered for enactment in the United Kingdom Parliament.

143 Caja de Ahorros y Monte de Piedad de Madrid (Case C-484/08)

144 The differences are not differences between national laws, but between language versions of the Directive, i.e. differences within EU law. Recital 19 uses the word "since" in the English version and corresponding conjunctions in French, Spanish, Portuguese, Swedish, but the word "sofern" (to the extent that) in German and "qualora", "wanneer", når (when) in the Italian, Dutch and Danish versions. In the latter language versions the impact of a clause on premium and/or cover is a condition for the exemption from the judicial review in the single case whereas this exemption is considered as an inevitable consequence following from the application art. 4(2) in France, the UK etc. The CJEU will have to decide which of the language versions is correct and binding.

145 Member States not implementing Art.4(2) include Portugal, Austria, Denmark, Latvia, Luxembourg, Greece, Romania, Slovenia, Spain and Sweden.

146 Germany, Italy.

147 Member States choosing to adopt this approach are the UK and France.

148 Germany.

149 Czech Republic, Latvia, the Netherlands.

150 Bulgaria, Estonia, Germany, Ireland, Portugal, Romania, Slovakia, Slovenia and Spain.

151 France, Luxembourg, Malta.

declare a term void but may also alter, amend and adjust the particular term, other terms, or indeed the entire contract[152].

145. Whilst the Unfair Contract Terms Directive is only applicable to contracts between a trader and a consumer, some Member States also foresee unfairness controls in standard terms in B2B contracts[153]. The approaches adopted by different Member States to B2B contracts vary considerably; indeed, some Member States do not provide for any specific rules for unfair contracts in B2B[154].

146. The relevant rules in some Member States regarding incorporation of terms and their interpretation represent a mechanism of content review; for example in a number of Member States the incorporation of a standard term depends not only on whether a party has had an opportunity to review the term but also upon the content of the clause; the fairness will form part of that analysis. In some Member States[155] general (non-insurance) concepts of law can be used to correct what are perceived to be disproportionate imbalances in the obligations to be applied – such as the principle of *laesio enormis* or the benchmark of "public policy/good morals" or the doctrine of *cause*.

b) Enforcement

147. The modes of enforcement in local courts together with consumer organisations, supervisory authorities, ADR bodies are all cited as having an effect in the process of enforcement of terms of insurance policies. For example, in France there are two sets of controls: administrative control by the supervisory authority and judicial control. In the UK, the Financial Conduct Authority may conclude that a particular term is unfair even if there is no judicial finding to that effect; in practice that will have an effect on an insurer's use of any similar clause thereafter. In Germany, there is an ex-ante duty of disclosure towards the supervisory authority only in relation to health insurance and compulsory insurance, but ex-post judicial control is still possible. In other Member States, undertakings are asked by regulators not to use certain clauses. Such clauses are easily accessible as they were published on the regulator's website.

148. It was noted that the adoption of ombudsman services to determine disputes and complaints (which services are typically not limited to insurance matters) has an impact on the approach to unfairness since an ombudsman in some jurisdictions (e.g. the UK) will often apply concepts of fairness unrelated to contractual interpretation or controls[156]. This is not the case in, for example, Germany where the ombudsman is bound to apply the law and is not entitled to "make" new law.

149. The wider impact of a judgment or finding classifying a term as unfair varies across different Member States. For example, in Spain a recent judgment which declared several clauses unfair applied to all market participants[157]. In Spain, Italy[158] and Portugal, if a case is brought by a consumer association and succeeds, this will have a general effect on the market. In contrast, in Belgium, even in such a case the judgments of the Commercial Court of Brussels in the Test Achats/DKV, AG, ING cases of 16 June 2003 only affected the companies involved in the cases and did not affect the practices of the other market participants (although the rulings later influenced specific legislation on health insurance regarding, for instance, pre-existing diseases).

152 Denmark, Finland, Sweden.

153 For example Germany, Austria, Estonia, Hungary, the Netherlands, Portugal, Slovenia.

154 Belgium, Bulgaria, Cyprus, Czech Republic, France, Greece, Ireland, Italy, Latvia, Luxembourg, Malta, Slovakia, Spain.

155 For example in Belgium, Spain and France.

156 The Financial Ombudsman Service in the United Kingdom was cited as an example of a service which applies fairness controls unrelated to any national or EU legal controls.

157 See Sentencia del Tribunal Supremo, Sala Primera, de lo Civil, de 1 Julio de 2010, rec. 1762/2006

158 See Legislative Decree no.206/2005, so called Code of Consumers, Art.140.

150. Where there is a low level of legal certainty, unfair contract terms issues do make a difference to an insurer's decision to offer its services cross-border.

c) Area of complexity and changes to the product

151. There was consensus that unfairness control across the EU is an area of complexity. Given that insurance products are contained within the wording of standard terms for mass risks, the extent of unfairness control in Member States is an area which requires specific legal advice wherever an insurance product is to be offered. The different rules are a cause of legal uncertainty. The fundamental importance of clarity of the contract to be offered means that unfairness control is an important issue for an insurer's decision to offer its services cross-border.

152. Resolving differences, for example, between different black and grey lists, whether a term is or is not core or examining the different consequences of unfairness from Member State to Member State may represent one of the challenges to an insurer considering offering a product in a new market[159].

153. A further general perspective is that in areas where there is a high degree of certainty about a legal result, unfair contract terms issues tend to make very little difference. Where there is however a low level of legal certainty, unfair contract terms issues do make a difference to an insurer's decision to offer its services cross-border.

154. The different and complex national regimes make it very costly to find out about the substance of national laws. Besides these costs also other local factors such as local regulatory and enforcement issues will have to be assessed.

155. As to large risks, there was consensus that unfairness control for large risks was less problematic. This is partly because such risks are typically brokered and the policyholders have the benefit of broker advice. Further, the sums at stake often mean that both parties are able to take the time (and to incur the cost) of negotiating specific terms so as to find the appropriate balance of protection offered by the product for the particular case. However, it was noted that there is sometimes an indirect effect on B2B risks since contract terms declared invalid in B2C contracts may thereafter (where such terms are also relevant in a business context) be removed from B2B contracts since insurers seek to increase standardisation of approach. Furthermore, in some Member States SMEs are treated more comparably with consumers than with large risks.

Section 7: Payment of premiums and consequences of non-payment

156. The payment of the premium is the main obligation of the policyholder. The parties must determine the amount of the premium, the date by which payment must be made and the consequences of non-payment.

a) Non-payment and late payment

157. A distinction can be drawn between non-payment of the first premium or a single premium payment and subsequent premium payments. In a number of Member States, insurance cover will only commence following of the first premium or the single premium payment[160]. In other Member States, it is the promise to pay the premium which provides the necessary consideration to complete the contract and actual payment is not therefore a formal necessity[161].

159 For example, in Poland the Consumer Protection Authority could include a clause on a black list, which from then on had the force of law. More than 100 unfair clauses had been identified for insurance.

160 For example: Austria (Section 38(2) VersVG), Germany (Section 37(2) VVG(unless the policyholder is not responsible for the non-payment), Italy (Art.1901 (1) Civil Code).

161For example, in the UK.

158. Given that suspension of insurance can have far reaching consequences for a policyholder, many Member States do provide for some form of protection to a policyholder before insurance protection is lost. This might include for example some kind of warning regarding the impending loss of insurance cover[162], protection against automatic termination[163] or a "period of grace" which provides time for payment[164].

159. In case of late payment of subsequent premiums, a number of Member States will suspend cover[165]. In some Member States there is a requirement that the insurer should set a deadline and give notice of this to the policyholder[166]. At least one Member State does not require any such warning[167], insurance cover is lost automatically 15 days after the premium was due. There also appear to be Member States where an insurer can only choose between continuation and termination of cover (such that suspension is not an option)[168].

b) Right to terminate

160. The right of a party to terminate a contract if the other party has not performed is an accepted principle across Europe as a matter of contract law. This applies whether the failure to pay is of a single premium, first premium of instalments or subsequent premium. Variations occur around the time within which termination can take effect. The period can vary from two weeks[169] (or not less than two weeks[170]) to one month or more[171]. There are a number of other variations which may apply in different Member States (e.g. invoicing and fault requirements). Accordingly, although principles regarding late or non-payment of premiums seem to show some similarity across Europe, the conditions for exercising remedies and remedies do vary.

161. In the brokered market (i.e. for large risks) there will typically be a premium due date and the consequences of late payment or non-payment would be set out in the contract[172].

162. In relation to mass risks, it was agreed that such differences in provision of cross border insurance services could require that different approaches be taken internally within insurance companies for the administration of policies. IT systems and automated procedures for premium collection and sending of notices regarding non-payment will need to be adapted for each market. A cost would be attached to this; there would also be costs for the administration of insurance policies. Providing insurance in countries where there is a culture of late payment was also identified as having the potential to affect the price of a product.

163. The potential for difficulty where a host country did not allow suspension of cover in case of late payments while the home country of the insurer allows suspension of cover (and Rome 1 operated to determine the law of the host country as the applicable law) was discussed. A further potential difficulty was suggested where a Member State (such as Italy) did not permit cover without payment while an insured was in the UK, which does permit such cover based on the

162Austria (Section 38(3) VersVG), Belgium (Art 15 Loi sur le contrat d'assurance terrestre), Germany (Section 37(2) sent. 2 VVG, Portugal (Art 60(1) Insurance Code), France (Art. L 113-3 Code des assurances).

163 In the UK there is automatic renewal of household and motor policies to prevent the customer from becoming unintentionally uninsured. Cover can be cancelled by the customer within 30 days.

164 Austria (Section 38(2) VersVG).

165 Austria (Section 39(2) VersVG), France (Art. L 113-3 Code des assurances), Italy (Art.1902(2) Codice civile),In the London market, a model clause is frequently used, whereby the contract will contain a premium due date(s), and the insurer has to give notice of cancellation for late payment (e.g. 15 days); therefore, cover will continue unless notice is given and acted on.

165 Austria (Section 39(1) Insurance Code, Belgium (Art15(2) Loi sur le contrat d'assurance terrestre, France (Art. L113-3 Code des assurances),

166 Austria (Section 39(1) VersVG), Belgium (Art.15 (2) Loi sur le contrat d'assurance terrestre), France (Art. L 113-3 Code des assurances), Germany (Section 38(1) and (2) VVG).

167 Italy (Art. 1901 (2) Codice civile).

168 Greece, Sweden.

169 Austria (Section 39(1) and (3) VersVG), Bulgaria (Art.202 and 236 Insurance Code), the Netherlands (Art.7:934 Burgerlijk Wetboek).

170 Belgium (Art 16 (1) and (3)), Art.15(2) Loi sur le contrat d'assurance terrestre: not less than 15 days), Germany (Section 38(1) and (3) VVG).

171 France (Art.L113-3 Code des assurances).

172 Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation also has differing provisions relating to the effect of payment to a broker.

promise to pay. However, these were discussed as theoretical examples rather than as regular issues of practical difficulty.

164. Generally the consensus was that premium payment was not an area where insurance contract law differences, although generating additional costs, presented any major problems for the cross border provision of insurance products. The effect of differences of law, and the requirement to adapt standard terms, was thought to be minimal and the impact of other practical issues, most particularly dependent upon the modalities of payment (e.g. by credit agreement, direct debit or as an online transaction) would be of greater significance by comparison as different consumer protection provisions would come into play. Difficulties which arise are sometimes general contract law issues and sometimes insurance law matters[173].

Section 8: Remedies for non-performance

165. Non-performance of a contractual obligation by one party subject to an insurance contract gives rise to certain remedies. There are differences in the remedies between Member States as a matter of substance and as to their application in practice. These are part of the overall complexity in this field.

a) Practical implications

166. Remedies available for non-performance differ depending upon the nature of the breach (non-disclosure, misrepresentation or fraud) and between Member States as to the remedy available.

167. These differences can be an important aspect of the policy, because they may cause costs of administration and uncertainty. For example in France, the procedure for amendment and termination of contracts that must be followed by law can create difficulties for insurers' IT systems and corresponding additional costs. There may be difficulties as to discharge and termination which could directly affect the nature of a product or affect the underlying risk and consequently its pricing.

b) Consideration of cross-border impact

168. It is not clear how much of a practical problem this is. For example, while some experts are of the opinion that this matter could have a potential cross-border impact, others either consider the remedies to be important but not a real obstacle (as they do not necessarily lead to additional costs) or not an obstacle at all.[174] A further opinion is that the issue is part of the general problems of complexity linked to the applicable foreign law.

c) Limitation periods

169. Consideration was given to the impact of different national laws on the subsequent period during which an insurer can remain liable after termination of 'claims-made' insurance contracts (a separate matter to the question of coverage under a policy). Although the cover is for issues that arise during the contract, some claims for damages may be made well after termination. The period during which such claims can be made varies in the different Member States (for example, 5 years in Austria and 10 years in France), which can have a corresponding impact on the price of the products Differences in limitation periods for claims against the insurer (for example, 2 years in France and 3 years in Germany) could also lead to some requirements for adaptation.

170. Nevertheless, there seems to be consensus that different limitation periods are not an obstacle for entering a foreign market and therefore would not influence a decision regarding this. Such differences might however lead to an adaptation of the insurer's internal procedures.

173 For example issues relating to the formation of a contract, principles of contractual interpretation, when a term may be implied, the circumstances in which a contract may be terminated etc.

174 There are differences between the law of England and Wales and of Scotland in this regard that do not cause practical difficulties within the United Kingdom.

171. A distinction should also be made between life and non-life products. Limitation is not a difficulty in relation to life insurance products.

Section 9: Renewal and termination

a) Renewal

172. Member States have diverging rules concerning the duration and renewal of insurance contracts. In many Member States the conclusion of long term contracts is possible. There are however in such Member States statutory provisions granting the insured a right to terminate such long term contracts after a certain time period has elapsed[175]. In some Member States such as France or Luxembourg that period is only one year, in others such as Germany termination is possible after 3 years, in the Netherlands after 5 years; in Finland the contract may be cancelled by the policyholder at any time. On the other hand, there are statutory provisions in some Member States that limit duration to one year[176]. Many insurance contracts in Member States with one year contracts nonetheless contain provisions for tacit renewal or prolongation.

173. Where choice of law is restricted to host state or other particular law, the variation in approaches in national rules requires that insurers which are considering offering an insurance product in another Member State will need to take legal advice in the new market where the product is to be launched. Insurers will then have to adapt their standard forms and contract administration procedures accordingly, both of which have a cost associated with them.

b) Termination

174. Normally, the duration of a contract is a matter to be agreed upon between the parties to the contract. However, as mentioned above, in some Member States a one year contract can be extended by tacit agreement[177]. The approach to termination can vary widely both as to the time when termination can take effect and as to whether this is possible after the occurrence of an insured event[178]. Termination is only possible prospectively (that is: as to future claims) in any event and typically can only be exercised during certain periods of time which can vary between Member States.

175. In many Member States[179] it is possible to alter the premium or other terms if such change takes effect on renewal and where the insurer has sent advance notice of such change and the insured is entitled to terminate the contract.

176. Where a policy is terminated before the expiration of cover, Member States take different approaches to the premiums which have been paid. In some countries the insured will receive a refund of the unused premium, where the law treats the premium as divisible[180]; in other Member States the whole premium may remain payable. In large risk contracts, this is usually a matter of specific provision in the contract, and often market model clauses are used by the parties.

c) Obstacles resulting from differences of approach to renewal and termination

177. Therefore there is considerable variation in the approach to duration of insurance policies across Europe and regarding renewal and termination. These differences involve local customer

175 Germany, Austria (with the exception of mandatory motor insurance), Netherlands, Greece, France, Finland, Luxembourg, Poland, Italy, Bulgaria.

176 Sweden, Portugal, Belgium (Art.30(1) Loi sur le contrat d'assurance terrestre).

177 Belgium (Art.30(1) Loi sur le contrat d'assurance terrestre) and the UK, as a matter of general contract law depending upon the intention of the parties.

178 For example, in Finland and Spain a clause providing termination after the occurrence of an insured event is regarded as unfair. Italy only allows the use of such terms in non-consumer contracts.

179 For example in Luxembourg (Art.42(1) Loi sur le contrat d'assurance, Finland (Section 19(1) Insurance Code), Germany (Section 163, 164, 203 VVG for life and health insurance. (However, the insured is not entitled to terminate the contract.) In other cases it may be agreed as a matter of contract.

180 For example in Austria (Section 40 VersVG), Belgium (Art.18 Loi sur le contrat d'assurance terrestre), Germany (Section 39 VVG).

expectations and understanding of financial products together with local market customs which have developed over many years. There are also differences where an insurer comes from a Member State where the duration of the contract can be agreed for a longer term and in the host country there is a possibility for the insured to terminate the contract at any time. All these differences impose upon an insurer which wishes to launch an insurance product in a new country a need for care in adapting standard terms and will also involve a need to adapt IT systems, examine pre-contractual information requirements on renewal and disclosure duties on renewal.

178. Mandatory caps on duration, and differences between such caps from country to country, were noted as being of particular importance. In the majority of cases, product characteristics will not be affected by such differences, although for some insurance business it will require change and will have an effect on product design and accordingly upon pricing. For some insurance categories (for example: health insurance) the option to alter the premium during the contract period is an essential part of the product concept such that national rules affecting this would have a decisive impact upon whether the product can be offered in a jurisdiction.

179. Particular note was also made of occasions where the result of a local law would be that a new contract is created. For example, if a policyholder had the benefit of a Scottish law policy but, now resident in another Member State, found that a modification in the policy meant the technical creation of a new insurance contract in that new country of residence, this has the potential to introduce confusion and uncertainty and to result in the applicability of a new law; it would also be a disincentive to an insurer to continue the policy since the insurer might face regulatory sanction if it were not authorised to offer business in the new country of residence. Thus a Member State's rules on renewal of insurance contracts could have unintended consequences and reduce the scope for provision of insurance services. It was noted that the exposure to regulatory sanction may be less a question of insurance contract law and more of regulation.

180. Consequences were also noted in the area of adjustment of premiums or alteration of conditions such as indexation clauses. In some Member States such modifications are permitted whereas in others they are permitted only under certain conditions or not at all. For an insurer coming from a Member State where such modifications are allowed seeking to enter into a market where they are not, such differences could influence the pricing of the product.

181. It was agreed that there was no evidence that any such issues presented a problem for large risks. In that arena there appear to be no identified obstacles to cross border trade arising from national provisions on termination and renewal.

Section 10: Subrogation

182. Subrogation is a complicated issue and it can encounter specific problems connected to the action in courts, jurisdiction and so on. Subrogation rules exist in general law and there are in some countries specific rules for subrogation in insurance. Moreover, in some Member States subrogation in insurance is automatic, after the insurer has paid the indemnity, while in other countries it has to be expressly agreed with specific contract terms or at the moment of the payment of the indemnity. In addition, special rules can have an effect on the concrete functioning of subrogation: for example, in some countries subrogation cannot operate to the detriment of the insured.

183. This being clarified, a certain debate exists between the members of the Expert Group about the importance of subrogation rules as an obstacle to cross-border offer of insurance.

184. It was noted in relation to large risks that the laws of subrogation may be a factor which influence the choice of law of the parties, the certainty and sophistication of the relevant law being a relevant factor. Also, large risk contracts may well have specially designed clauses which have a

bearing on subrogation rights if claims are paid. Therefore, subrogation is a significant area but where there is choice of law and freedom of contract, was not considered to be a significant problem in relation to cross border trade.

185. In was noted in respect of mass risks that the costs of exercising subrogation rights were often high (compared to the claims payments made) and recovery can be low relative to the costs of exercising rights of subrogation.

186. Some members of the Group considered complications connected to subrogation to be high in cross-border situations. However, it was noted that different rules on subrogation may only lead to changes in the premiums, not to substantial changes in mass products; and different rules on subrogation would not stop an insurer from offering insurance products cross-border, even if potentially costly, because it is a problem also for local offerings.

187. In conclusion, rules on subrogation do not seem to be a significant problem in cross-border insurance, in respect of either large or mass risks.

Section 11: Claims settlement/liquidation

188. Management of a policyholder's claim is a core issue for insurers and policyholders. Efficient claims management is central to the product; indeed it was agreed that efficient payment and dealing with a claim is a differentiator for insurers.

a) Variations in approach

189. Laws and practices between Member States appear to differ significantly; both as to whether there exist any national laws on the issue at all and concerning the content of such rules as do exist. Even where national rules exist they appear to regulate claims management only partially. An example of such national rules can be found in Chapter 8 of the UK's Insurance Conduct of Business Sourcebook (ICOBS) which contains some general and specific rules on claims handling (e.g. for motor vehicle liability and employer's liability). These rules include for example provisions which will regulate when it is permissible as a matter of regulatory practice for an insurer to reject a claim for misrepresentation. Another example was provided of Bulgarian law which required payment by an insurer within 15 days of proper notification of a property insurance claim[181].

190. Local supervisory review of claims handling is frequently very stringent and EIOPA has also launched guidelines in this field[182]. It is therefore acknowledged that claims handling and settlement must be assessed not merely by reference to insurance contract law but also by reference to local supervisory rules and EIOPA guidelines.

b) Claims must be settled promptly

191. A common principle concerning claims settlement in European insurance is that claims must be settled promptly. Several Member States have provisions requiring insurers to accept or reject claims in a specific time. For example, in Austria the claim becomes payable if the insurer does not respond within one month to the insured's enquiry regarding non-payment, provided that the inquiry was submitted two months after the claim was made[183]. If the insurer responds and explains why investigations have not been completed yet, the insurance money does not fall due[184].

181 Art. 208 Bulgarian Insurance Code.

182 EIOPA, Guidelines on Complaints-Handling by Insurance Undertakings, EIOPA-BoS-12/069 of 14 June 2012, see https://eiopa.europa.eu.

183 Section 11(1) VersVG.

184 However, Section 11(2) VersVG may provide for a part payment.

192. The imposition of interest upon unpaid claims was mentioned as a significant factor which can vary from Member State to Member State. For example, in Spain interest may increase, after two years, to 20% per annum[185].

193. As a result of such variations insurance contracts may require significant adaptations if an insurance product is to be offered cross-border since it will be important for an insurer to understand such factors fully. However, the consensus was that most these issues are not a problem caused by differences of national insurance contract law. The obstacles to cross-border provision on insurance contracts were instead mainly practical – for example, the costs of setting up a sufficient network of third parties capable of assisting an insurer in providing services in a manner and to the standard acceptable in the local market and reflecting the insurer's reputation, business model and objectives. For example, in the case of property insurance, an insurer will need to build up relationships with a network of builders, plumbers, locksmiths, roofers, electricians etc.[186] The legal aspects and the need for adaptations of the contract arising from differences in contract laws were perceived in this context to be of relatively minor relevance.

185 Art. 20 Ley 50/1980 de contrato de seguro

186 Reference in this regard was made to the 2010 Retail Market Study prepared for the Commission where it was found that a lack of local presence for claims handling was treated sceptically by consumers – see paras 3.8 at page 30 and para 3.12(d) on page 33.

Chapter IV: Life Insurance

Section 1: Variations of life insurance contracts

a) Functions and types of life insurance

194. In 2011, life insurance generated more than 50% of the total premium revenue in the European insurance market[187]. Life insurance has various functions: for example to provide means of support for the policyholder's family after his/her death; to provide means of support (by investment) during the policyholder's life combined with the protection of a death benefit; to provide security for loans and life insurance in connection with other commercial transactions[188]; to be part of a pension scheme for the policyholder's own old age[189]. Accordingly life insurance may adopt a great variety of forms.

195. Defining the different forms of a life insurance contract is problematic as there are many elements which make up the contract. There is much overlap between the different forms of the contract. The following three examples demonstrate different types of life insurance which can be obtained (but which should not be considered to be exhaustive): *Pure risk policies* provide financial protection in case of death, (serious) illness or disability[190] of the person at risk in the form of payment of a fixed sum or an annuity at that occasion. *With-profits policies* contain both a risk and a savings element in the premium and mature either with the death or the survival of the person at risk at a certain date; they allow the beneficiary to have its share in the profit made by the insurer's investment or the result of a certain benchmark. *Investment-linked policies* combine life insurance with an investment in financial products which are selected by the client who consequently bears the investment risk.

196. Investments that home state regulators permit to be linked to investment-linked insurance contracts differ in each country. Such contracts can also be described as 'unit-linked' contracts. In countries such as France and Belgium the 'unit' has a specific statutory meaning which does not exist in other countries. For example the meaning and treatment of the 'unit' in France and Belgium is similar but in one country charges should be taken by cancelling units whereas in the other charges must not be taken by unit cancellation. In other countries such as the UK if the 'unit' is mentioned in the contract terms it serves an administrative function for the purposes of describing how that particular contract operates. In Ireland the investment-linked rules are broader than in for example, Germany. Such rules will dictate product design and are an important consideration for insurers when offering investment-linked insurance products on a cross-border basis. Furthermore, the tax treatment of these products plays a major role in this context as well. For instance, in Spain tax benefits are linked to the permitted asset rules in that country (tax deferral is only available if the funds satisfy those rules).

b) Elements of contractual design

197. Numerous other intermediate forms of life insurance exist[191]. The various elements of life insurance are applied in different ways in different Member States: the definition of the insured event; the determination of the duration of the contract (term or whole life); the risk distribution with regard to the investment portion of the premium; the payment of premiums in a single

187 http://www.insuranceeurope.eu/uploads/Modules/Publications/life-2011_final.xls.

188 Life insurance can be used as a collateral in all transactions where a debtor promises performance over a long term and the risk of non-performance resulting from this person's death is meant to be reduced, e.g. the takeover of an undertaking by a purchaser promising to pay the price in instalments.

189 On the latter point see the Commission's White Paper "An Agenda for Adequate, Safe and Sustainable Pensions", COM(2012) 55 final, of 16 February 2012, see measure 19 which indicates the Commission's intention to "explore the need for removing contract-law related obstacles to the design and distribution of life-insurance products…"

190 Not in every country illness and disability are considered life insurance. In for instance the Netherlands, they are classified as non-life insurance.

191 In Houseman's Law of Life Assurance, 14th ed. London 2012, p. 52, more than thirty types of insurance contracts are listed and described.

amount of money or in installments; the mode of payment of the insurance money in a lump sum or in annuities; the time when payment falls due, i.e. at the occurrence of the insured event or at a later date. Other variations result from the conclusion of the contract by an individual or as a group insurance which represents an important number of cases in some Member States such as France. The mix and overlap of risk and investment elements in commercial practice explains the existence of divergent national legal definitions of life insurance which may give rise to difficulties in the cross-border sale of insurance products, see infra 3.

198. Retirement products differ from other life insurance products because they must have an explicit retirement objective and provide an income after retirement. Thus pensions are a specific type of "life savings insurance contract" with a maturity at retirement age and which can be converted (either automatically or through a new contract with the same or another provider) into an annuity but which can also be paid out as a lump sum in whole or in part (for example in the UK pension benefits can be taken partly as lump sum, the remainder must be used to purchase an annuity). As such, pensions have an accumulation phase (building up savings) and a decumulation phase (payment of annuities or a lump sum).

c) Survey

199. This part of the report is meant to shed light on any potential problems that result, for the cross-border provision of life insurance, from the divergences between national insurance contract laws, both general and specific to life insurance. Alongside the areas outlined below the Expert Group discussed other topics such as differences relating to the designation of the beneficiary, the rules on suicide and on the intentional killing of the person at risk. While contributing to uncertainty and complexity in the cross-border insurance business they were not considered to impede such business on their own.

200. In many Member States, legislation other than on insurance contract law (especially tax law, social and labour law and supervisory law) determines the parameters of many of the topics mentioned below. In addition, actuarial practice and mortality risk differences[192] make it more difficult to provide cross-border insurance. They are outside the scope of the Expert Group's mandate, see section 10.

Section 2: Insurable Interest

201. In the UK and Ireland, a life insurance contract is void in the absence of an insurable interest which the person interested in the policy must have in the life of the person at risk; it may result *inter alia* from natural affection, e.g. towards a spouse, or from a financial loss which the policyholder might suffer when the person at risk dies, e. g. an employee. While it is the duty of the court always to lean in favor of an insurable interest, if possible[193], there is abundant case-law holding for example that a parent has no insurable interest in the life of a child and a debtor no insurable interest in the life of the creditor whereas the creditor may insure the debtor's life[194]. Functionally, the requirement of the insurable interest is intended to distinguish insurance from wagering, and to protect the person whose life is insured. In continental jurisdictions like France and the Netherlands the latter objective is pursued by the requirement of that person's consent. As to the prevention of wagering the present insurance industry appears unlikely to succumb to the temptation of gambling. In the UK the Law Commission is therefore enquiring whether the element of insurable interest is still needed as a determining element for an insurance contract[195]. For the time being, however, it is part of the law.

192 Cf para 47. According to the Block Exemption Regulation new competitors on a national market have access to general rules on information.

193 As stated by Clarke referred to Re London County Commercial Reinsurance Office Ltd [1922] 2 Ch 67

194 Malcolm Clarke, The Law of Insurance Contracts, 4th ed. London 2002, ch. 3-7, p. 125 ff. providing a broad survey over the case-law applying the Life Assurance Act, 1774.

195 The Law Commission, Insurance Contract Law – Issues Paper 4 of January 2008: http://lawcommission.justice.gov.uk.

202. Where an insurer from a continental Member State offers cover in the UK market it will have to take into account that the consent of the person at risk which the insurer wants to obtain in accordance with its own procedures may in some cases not suffice to replace the insurable interest required by UK law and that the contract may therefore be considered as void by an English court applying English law. This will hardly impede the insurer to enter the UK market but it will be an obstacle to the conclusion of the contract intended in the individual case. Moreover, the insurer will have to incur additional costs for legal advice as part of the advice they receive for entering any new market.

Section 3: Pre-contractual information

a) State of harmonisation

203. The insurer's pre-contractual information duties have been (or are being)[196] harmonised to a large extent by general rules[197] and specific rules for life insurance[198]. They relate to many aspects of the contract: the provider, the applicable law, the right of withdrawal, the product characteristics to mention just a few. These rules lay down minimum requirements and allow Member States to establish further information duties[199]. Member States have made use of this permission in numerous ways[200]. A trend to full harmonisation would trend to remedy existing differences in national laws. Supervisors of some Member States[201] have been empowered to add their own additional regulation on top of national law. For foreign insurers it will be is quite difficult to get to know the additional national law, the additional supervisory regulation and practices and possible self-regulation. Regarding pensions, local social and labour law and sometimes tax law in many Member States overrule certain provisions in insurance law[202].

b) The regulation of marketing

204. As to the insurer, there are Member States which require insurance undertakings to provide their entry number in a commercial register or to disclose the financial group to which they belong[203]. With regard to the product one Member State insists on the consumer's signature affirming the receipt of a written guide containing information about the product. A similar confirmation by signature is needed in another Member State in respect of the description of the investment option chosen by a client purchasing investment -linked life insurance. Concerning the intermediary's services, some Member States require the disclosure of business connections between the intermediary and the insurer and a precise description of the intermediary's rights and

196 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ 2000 L 178/1, Art. 5, 6 and 10; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC (Distance Marketing of Financial Services Directive), OJ 2002 L 271/16, Art. 3 and 4; Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (Insurance Mediation Directive), OJ 2003 L 9/3, Art. 12 and 13; Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ 2009 L 335/1, Art. 183 and 184, not yet implemented.

197Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ 2000 L 178/1, Arts. 5, 6 and 10; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC (Distant Marketing Directive), OJ 2002 L 271/16, Art. 3 and 4; Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (Insurance Mediation Directive), OJ 2003 L 9/3, Art. 12 and 13; Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ 2009 L 335/1, Art. 183 and 184.

198Art. 185 Solvency II.

199 See e.g. Art. 4(2) of the Distance Marketing Directive or Art. 185(7) Solvency II, both above in fn. 192

200 For a comparative survey which does however not identify the Member States where specific rules are in force, see Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), Report on National Measures regarding Disclosure Requirements and Professional Requirements for Unit-Linked Life Insurance Products, which are additional to the Minimum Requirements of the CLD and IMD, CEIOPS-DOC-20/09 of 2 July 2009, to be found on the website of EIOPA: https://eiopa.europa.eu/publications/reports/index.html.

201 For instance in the Netherlands the Dutch Central Bank (DNB) and Netherlands Authority for the Financial Markets (AFM) introduced additional regulations regarding transparency and pre-contractual information on costs.

202 In the Netherlands the Pension Law overrules the provisions on for instance pre-contractual information, right of withdrawal, payment of premiums and payment of insurance money.

203 The following survey summarizes information contained in CEIOPS document 20/09 cited above in footnote 195.

obligations before and after conclusion of the contract. There are also in several Member States divergent information duties relating to the charges and other costs of the conclusion and administration of the contract. Finally, national legislation may also prescribe specific ways and forms of providing information; it may e.g. standardise the forms to be used by insurers for the conveyance of the information or may insist on specific information to be highlighted in order to warn the applicant.

205. The divergences reported in the preceding paragraph do not relate to the insurance product as such but rather to its marketing. Therefore, no adaptation of the insurance contract is required where an insurer wants to enter the market of another Member State. However, the insurer will have to adjust its marketing procedures, in particular regarding pre-contractual information, to the legal requirements of the target state. Information requirements are causing costs to the insurance industry. The more states that are targeted the more difficult and costly compliance will become. The use of unified websites within the same language area (e.g. Greece/Cyprus or France/Belgium/Luxembourg) may be excluded altogether where for example one Member State requires information A to be highlighted whereas another Member State rather demands information B to appear in bold letters. On the other side the users of cross-border insurance services could increasingly become uncertain about the information needed if they experience that pertinent requirements change from Member State to Member State; as a result this may affect legal certainty.

c) Life insurance and financial instruments

206. Certain insurance products, in particular investment-linked life insurances, may be classified, because of their hybrid character (see *supra* paras. 194 - 197), in some Member States as insurances while other Member States consider them as financial instruments. The European Court of Justice has classified such contracts as insurances, but only in order to exclude the application of Directive 85/577/EEC, not in order to allow application of rules on financial instruments. In this context courts in France[204] and the Netherlands[205] have qualified them as insurance[206], while in Italy[207] they have been classified as financial instruments. The consequences of such classification will influence the pre-contractual information duties during the duration of the contract. According to the Italian *Corte de cassazione* the insurer, when marketing a financial product, may be subject to obligations similar to those incumbent upon investment firms, i.e. the enquiry into the client's knowledge and investment objectives as well as the giving suitable advice[208]. The breach of such obligations led to a damages award which shifted the risk inherent in unit-linked policies from the policyholder to the insurer and thereby profoundly distorted the product. A foreign insurance company offering an investment-linked insurance policy in Italy would have to adjust its market entry strategy; beyond providing information it would also have to take an active role in investigating the client's profile and providing best advice.

207. In summary, divergences in the national laws relating to pre-contractual information duties and to their scope of application have a high potential of rendering the cross-border distribution of life insurance products more costly, and making it more difficult to use certain distribution channels, for instance online insurance. Pre-contractual disclosure requirements are sometimes rooted in local supervisory law. The main restrictive effect on cross-border trade is legal uncertainty about the consequences of providing information under the legislation of one Member State to satisfy the pre-contractual duties required but which would not satisfy the requirements of another

204 See four decisions of Cass. ch. mixte 23 November 2004, no. 02-11.352, no. 01-13.592, no. 03-13.673 and no. 02-17.507.

205 Art. 7:975 Burgerlijk Wetboek (Civil Code) defines a life insurance, irrespective of unit-linked or with-profit. A life insurance product has to have a certain degree of risk. For instance a unit linked product will be considered a life insurance product when the amount payable when the insured dies is 90% or 110% of the value of the contract at moment of death.

206 The Solvency II Directive applies to life insurance contracts where the investment risk is borne by the policyholders

207 Cass. 7 February 2012 no. 6061/12, confirming a judgment of App. Firenze.

208 See Art. 19 of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EC, OJ 2004 L 145/1.

Member State for the same life insurance product. This adds to the complexity of cross-border insurance arising from other legal divergences. In light of the serious consequences of a breach of such duties the legal differences were considered as a major obstacle to cross-border insurance[209].

Section 4: Right of withdrawal

208. The policyholder's right of withdrawal from a life insurance contract is harmonised in Art. 186 Solvency II. However, the Directive leaves some leeway for – potentially divergent – national rules: such as first, in respect of the duration of the cancellation period between 14 and 30 days[210]; second, as to its starting point and its end in case the policyholder is not informed about the right of withdrawal; third, with regard to the contracts that may be excluded; fourth, as to the consequences of a withdrawal, in particular the restitution of the sums paid by the policyholder. Member State law differs on these points. In some Member States such as France, in the absence of receipt of the policyholder's information about the right of withdrawal, the cancellation period may be extended over years[211].

209. Life insurers count on a certain quota of their contracts to be cancelled anyway, whether by withdrawal at the initial stage of the contract, by the later claim for the surrender value or by other forms of termination. In light of this experience differences in withdrawal rights do not deter an insurer from entering a foreign market. However, the differences relating to the subsequent stages of the contract increase uncertainty, complexity and costs. This pertains in particular to different rules on the reimbursement of premium and investment. Such claims may be brought after many years depending on the sanctions imposed by national laws[212].

Section 5: Disclosure

210. For policies providing for a high death benefit in particular[213] the pre-contractual disclosure of data relating to the age, health, lifestyle and profession of the person at risk by the policyholder is crucial for the assessment of the risk by the insurer. The laws around the insured's duty of disclosure and the connected remedies are not harmonised in the EU. The rules on how that data may be procured differ between the Member States[214]. Some of the differences relate to fundamental rights[215], data protection laws, genetic testing laws or anti-discrimination laws; they are considered to be outside the mandate of the group, despite their obvious impact on life insurance contracts.

211. In contract law, the main difference is between those Member States which require the applicant to spontaneously disclose the relevant information and to provide answers to general

209 There are currently on-going debates within the European institutions on pre-contractual information disclosure requirements with an aim to increase consumer protection. This could result in convergence of the requirements, such as the proposed Key Information Document (KID) for PRIPS. In addition, DG SANCO recently conducted a consultation on consumer protection for third pillar retirement products and EIOPA on creating a single market for Personal Pension Products including references to pre-contractual information disclosure requirements.

210 It is only for contracts that the Distant Marketing Directive fixes an inderogable withdrawal period of 30 days, Art. 6 Dir. 2002/65/EC.

211 See Art. L 135-5-2 para. 4 Code des assurances where the right of withdrawal is extended to a period of eight years where the policyholder does not receive the pertinent information.

212 In the case C-209/12 (Endress v. Allianz) the Court of Justice dealt with a provision of the former German Insurance Contract Act according to which the withdrawal period does not start to run until the policyholder has been informed of the right to cancel the contract, but that it ends one year after payment of the first premium in any event. The Court of Justice ruled that "Article 15(1) of the second life assurance directive [90/619/EEC] read in conjunction with Article 31 of the third life assurance directive [92/96/EEC] must be interpreted as precluding a national provision [such as the one referred to above] under which a right of cancellation lapses one year at the latest after payment of the first premium where the policy-holder has not been informed about the right of cancellation." According to settled case-law the said national rule is therefore inapplicable. It is up to the referring court, the Bundesgerichtshof, to draw the consequences from this judgment at the national level and to decide on the plaintiff's claim for reimbursement of the premium.

213 Another example would be cases where the annuities paid by the life insurer depend on the lifetime of the insured

214 In the Netherlands, regarding occupational pensions: the insurance company is not allowed to ask any questions regarding the health of the employee.

215 The Belgian Constitutional Court in its judgment of 10 November 2011 on the law of 21 January 2010 relating to insurance (death insurance linked to a mortgage) decided in relation to policy holders with a serious health risk that medical questionnaires of insurance companies constituted an infringement of the right to respect for private life as provided by Article 8 of the ECHR. Questions by of insurance companies for life insurance must be strictly necessary and proportionate which excludes all questions of the type mentioned in point 15.

questions concerning for example the “present state of health“ or “previous diseases“, and those jurisdictions which limit the applicant’s duty to replying to clear and precise questions. Member States such as Austria, Belgium or Portugal would be in the first group, while Finland, France, Germany, the Netherlands, and the UK (for consumers) would belong to the second[216]. The transition between the two models is fluid, since there may for example be different views on what a “clear“ question is and how “precise“ it has to be. Insurers must investigate what kind of question is permitted in the target country before engaging in cross-border business. This causes costs and may make it more difficult, depending on the pairs of countries involved, to develop interactive websites for online business even in the same language area. Consumers who are prepared to purchase contracts on a cross border basis may find the inconsistencies confusing and may not be certain about their own responsibilities depending on the country they are dealing with.

212. The differences also concern the legal consequences of a breach of the disclosure duties and even the handling of a claim[217]. In some countries, the policyholder may entirely lose cover retroactively even in the case of an innocent breach, while in others the extent of the insurer’s discharge depends on the causation of the insured event by the inaccurate disclosure, and in a further group of jurisdictions on the additional requirement of the policyholder’s fault[218]. These differences affect the extent of cover, i.e. the product of insurance.

213. By contrast, differences relating to post-contractual disclosure duties emerging in the case of an aggravation of risk were not perceived as an obstacle to the conclusion of cross-border life insurance contracts by either insurers or consumers.

Section 6: Payment of insurance money

214. The payment of insurance money is regulated with regard to two aspects: the time of payment including the sanctions for default, and the form of payment. The divergent regulations of the delays allowed for payment and of the sanctions for default were generally not considered to pose problems for cross-border insurance. However Spanish law fixes the interest rate at 50% above the legal interest rate and – from two years after the insured event onward – at a minimum of 20%[219]. Where the insurer is still disputing its liability after those two years this implies a rapid increase of the sums owed and has allegedly induced foreign insurers to leave the Spanish market in the past.

215. Rules on the form of payment concern, first, the choice between a lump sum and annuities and, second, where agreed upon, the insurer’s right, in the case of health insurance or disability insurance, to perform its obligations in kind, e.g. by an accredited physician. The former point relates to regulations of tax law and social security law which are not covered by the mandate of the Expert Group, see however above at para. 10. On the latter aspect the law does not appear to be settled in many Member States.[220]

Section 7: Payment of premium

216. Member States have enacted a number of – divergent – general provisions aiming to protect policyholders who default in the payment of the first or a subsequent premium[221]. In respect of life

216 See the references in PEICL, Article 2:102 N1 – N5.

217 For instance in the Netherlands; when the insurance company suspects that a deceased did not answer the health questions faithfully (so there is a suspicion of fraud), this has to be investigated by a special committee (Toetsingscommissie Gezondheidsgegevens). This committee gives a binding judgement.

218 See the comparative survey in PEICL, notes N1 to N7 on Article 2:102. Recently the UK has enacted the Consumer Insurance (Disclosure and Representations) Act 2012, c. 6.

219 See Art. 20 (4) Ley 50/1980 de contrato de seguro.

220 A clear prohibition of insurance contracts that exclusively grant performance in kind follows, at EU level, from Arts. 201 – 202 Solvency II for legal expense insurance.

221 See the survey in PEICL, notes N3 – N4 to Article 5:101 for the first premium and notes N2 – N3 to Article 5:102 for subsequent premiums.

insurance generating a surrender value these provisions are often superseded by special rules, see below section 8. For other policies the above-mentioned national provisions require the insurer to warn the policyholder of the imminent forfeiture of cover; they may provide for a certain form to be used for such warning; and they may impose a certain grace period that has to elapse before cover is suspended.

217. But the details concerning the required form, the way of communication or the duration of the grace period differ from country to country. While most Member States require the insurer to remind and warn the policyholder somehow, no warning is required under Italian law, and insurance cover automatically ends 15 days after the subsequent premium fell due[222]. These differences are not perceived as an impediment to enter a foreign market, but they raise costs in particular for IT systems for the administration of the invoicing, warning and collection procedures that usually have to comply with the law of the policyholder's domicile.

Section 8: Termination of the contract and surrender value

218. Given the long-term duration of most life insurance contracts early termination occurs frequently. Termination as such does not appear to pose many problems: In some Member States mandatory provisions enable the policyholder to stop paying premium and claim the surrender value or convert the contract into a paid-up policy; in others this follows from contract terms and commercial practice.

219. But there are differences between national rules concerning the exercise of those rights and its consequences. For example, the repurchase may be excluded or deferred for certain types of life insurance, in particular those forming part of a pension scheme[223]. While such qualifications are motivated by public policy considerations relating to old age provision and might be excluded from the mandate of the Expert Group, other limitations form part of contract law. Thus, some national laws require waiting periods of two years before the policyholder may claim the surrender value[224], whereas other national laws are silent on this point or like German law that gives the right of termination at any time[225]. They leave the time factor to the terms of the contract and to the accumulation of a surrender value sufficient to justify a claim. Thus, where an insurer originating in a Member State lacking mandatory rules on this point and allowing its policyholders, under the insurance contract, to claim the surrender value for example after 4 years, enters the Bulgarian market, it will have to adjust its products to the compulsory two-year period. This may imply further changes relating to the remuneration of its intermediaries.

220. Different national rules of law may also determine the calculation of the surrender value. This issue is mainly a matter of supervisory law and therefore outside the mandate of the Expert Group. But it also depends on the deductions from the gross surrender value which are permitted by insurance contract law, in particular the costs of contracting including the acquisition costs. According to German law only 20% *per annum* of those costs may be deducted from the gross surrender value in case of surrender during the first five years[226]. Thus the possible reduction is much lower (and the resulting net surrender value higher) under German law than in other Member States whose laws allow insurers to deduct the full costs of contracting and acquisition from the first year's premium.

222 Art. 1901(2) Codice civile.

223 See for example for Sweden ch. 11 § 5(2) Försäkringsavtalslag (2005:104): deferral of one year; for France Art. L 132-23 Code des assurances: exclusion for some and limitation for other types of life insurance. In the Netherlands surrender of a pension is forbidden; art. 65 Pensioenwet (Pension law) except for small amounts (€ 451 per year – 2013; Art. 66 Pensioenwet).

224 Art. 240 (1) Bulgarian Insurance Code.

225 See e. g. Art.168(1) and (2) Versicherungsvertragsgesetz.

226 See Art. 169(3), 1st sentence Versicherungsvertragsgesetz.

221. Where an insurer from such a country, having for example an average termination quota of 10% decides to enter the German market with the business model of its home country it will soon notice that the costs calculated for the payment of surrender values to the 10% of its German customers terminating their policies will be much higher than those in its home state. Thus, that insurer will have to adjust its product to German law and will for example be compelled, *ceteris paribus*, to either charge a higher premium than at home, to amend the distribution agreement or to accept the costs.

222. Concluding, differences in regulation regarding termination of the insurance contract between Member States are not considered a major obstacle to cross-border provision of life insurance, but they compel insurers to adjust their products to the insurance contract law of the host Member State (which is currently the generally accepted approach used by insurers seeking to enter into a new market).

Section 9: Review of standard contract terms – transparency

223. The judicial review of unfair contract terms may gain particular significance for life insurance. This has been demonstrated by German case-law dealing with intransparent clauses. Directive Unfair Contract Terms provides that such clauses will be interpreted to the benefit of the consumer[227]. Moreover, intransparent clauses will be subject to a judicial review of their content even where they deal with the core elements of the contract; such clauses would be immune against judicial review if they are transparent[228]. Under the Directive the non-binding effect of an intransparent clause depends on a substantive finding, namely whether that clause, "contrary to the requirement of good faith, ... causes a significant imbalance in the parties' rights and obligations..."[229]. Lack of transparency as such does not invalidate the clause. This is the law in most Member States resulting from the implementation of the Directive. The Directive provides for minimum harmonisation[230].

224. In Germany, the *Bundesgerichtshof* has started as early as in the 1990s to consider lack of transparency as a ground of invalidity irrespective of any imbalance of the parties' rights and obligations; since 2001, that case-law has been extended to insurance contracts. Contract terms relating to the core of the insurance product, i.e. to the calculation of surplus bonuses in with-profits policies, to the calculation of the surrender value or of the costs to be deducted from it are by their very nature complicated. Nevertheless the court postulates that they should be transparent to the extent possible, and invalidates intransparent terms[231].

225. The standards of transparency are not very clear and emerge only in the course of development of that case-law. Lack of transparency may for example result, not only from the wording of a contract clause, but also from its allocation in the whole contractual framework. Compliance is difficult. It is even more difficult for foreign insurers which have drafted their policies against the backdrop of transparency standards of their own jurisdiction. For the use in Germany such policies would certainly need to be adjusted in order to be immune against judicial review and invalidation.

227 See Art. 5, 2nd sentence Directive 93/13/EEC.

228 See Art. 4(2) Directive 93/13/EEC.

229 See Art. 3(1) Directive 93/13/EEC.

230 See Art. 8 Directive 93/13/EEC.

231 The most recent decision of the Bundesgerichtshof, BGH 14 November 2012 (IV ZR 198/10), Versicherungsrecht 2013, 1116 ff., at the complaint of a consumer organization, declared invalid about a dozen of contract terms.

Section 10: Impediments inherent in areas other than contract law

226. This chapter of the report points to a number of legal divergences originating outside general contract law and insurance contract law which have an impact on cross-border insurance business. Their impact has been clearer in life insurance than in other sectors. While these legal divergences are outside the mandate of the Expert Group, they should be mentioned here. First, there are many intricate links between life insurance and other parts of private law such as family law, succession law or insolvency law. It is not always easy to assign a legal divergence that hinders cross-border insurance to either insurance contract law or to one of those areas.

227. Second, life insurance is also influenced by public interest that affects a number of issues and the basic structure of some products. Modern legislation inspired by human and fundamental rights limits the possibilities of the insurer to assess the risk by appropriate questions and the requirement of medical tests. While this development has a European dimension, the positive legal rules on data protection, genetic tests and anti-discrimination differ from Member State to Member State.

228. Third, life insurance is also one of the tools employed by a large number of Member States in pursuance of their social policy. To prevent poverty of the retired elderly citizens and to supplement the social security pension systems they promise tax benefits to those who save money while they are younger to take out life insurance. This is not the case in all Member States; in some countries such as Bulgaria life insurance is not "shaped" by the laws pursuing a specific social policy. But in other Member States the national laws often prescribe details of the contracts which are susceptible of being subsidised. In practice, these provisions often overrule the general provisions in insurance contract law[232]. In the case of a direct conflict such provisions which are often regarded as crucial by a country for safeguarding its public interest in social organization, may even be seen as overriding mandatory provisions for the purposes of Art. 9(1) Rome I; this may apply to pension schemes established by national law, but under certain conditions[233] also to pension schemes resulting from collective bargaining.

229. A pension product consists of two parts: an accumulation and a decumulation phase. When a policyholder is obliged to transfer his accrued pension capital to an annuity, cross-border movement of the policyholder can cause problems. For instance, in the Netherlands an individual can save for additional, private pensions in the third pillar. The Dutch tax law prohibits the pay-out of a lump sum[234]. Suppose the policyholder moves to another Member State, where he reaches his retirement age. According to the Dutch tax law, the policyholder would have to convert his accrued pension capital into an annuity. According to the Dutch Central Bank (the supervisor) the conversion into an annuity is a new legal agreement. This means that the Dutch insurance company would be considered conducting cross border activity and would for instance need a notification. However, the company may not be interested in providing services in that country in order not to be confronted with insurance and applicable law in that Member State. As a result, the insurance company may refuse to offer the annuity. The policyholder who would be forced to receive a lump sum would be confronted with a major fiscal claim. He would have to pay up to 72% taxes and fines to the Dutch tax authorities[235].

230. In the UK, there are also tax incentives to take an annuity before the age of 75 (and tax penalties on taking any benefits before retirement age). For third pillar pensions there is a

232 For instance insurance contract law allows for withdrawal while other law (like pension law) forbids this.

233 According to the Court of Justice's ruling in case C-341/05 (Laval un partneri) it is not entirely clear whether, in which context and under what conditions collective agreements are an equivalent to provisions of state law when it comes to the identification of overriding mandatory provisions.

234 In Germany, the situation is comparable for certain products where tax reliefs are granted in case of an annuity but not in case of the payout of a lump sum.

235 Art. 19b Wet op de loonbelasting 1964 (Wage Tax Act 1964) and Art.30i Algemene Wet inzake Rijksbelastingen (State Tax Act).

regulatory requirement[236] for insurers to offer an 'open market option statement' which enables their policyholders to accept an annuity from the insurer or to decide to purchase an annuity on the open market. The Association of British Insurers has also created a Code of Conduct on retirement choices to enhance customer communications concerning retirement options and which insurers have signed as a condition of membership. The ABI's Code aims to ensure that policyholders are equipped with the information they need to understand their options, shop around and make informed choices.

231. Cross-border movement of a policyholder can also cause other problems. Third pillar pension holders may wish to make a transfer of their pension contributions from one pension scheme to another in the same country but would encounter barriers if they are habitually resident in a second country. They may wish to do this for a number of reasons, for example to take advantage of a new pension product, to access different investment options or because of concerns surrounding their existing pension provider. They may even wish to transfer their pension from one product to another with the same pension provider. From the consumer's perspective they may see the pension savings as attached to the country where the savings are held, particularly because of the tax benefit surrounding the schemes. However the transfer would involve a new insurance pension contract and therefore the pension provider would have to be regulated in the country where the person is habitually resident and the social and labour laws, general good and pre-contractual requirements of that member state would have to be complied with. As mentioned in earlier parts of this Report the scope and extent of 'general good' is uncertain for an incoming insurer and the same uncertainty applies to the scope and extent of social and labour laws applicable to pensions. Advice is therefore necessary for insurers to establish what the general good and the social and labour laws are.

232. In Germany, life insurance contracts have to comply with a number of conditions in order to be certified as eligible of subsidies; among others the costs of contracting must be charged to the policyholder's account by not more than 20% *per annum*, and the disbursement of the benefits must not begin before the policyholder reaches his or her 60th birthday[237]. These are but some examples which explain the great significance which divergent tax law and social security law has on cross-border life insurance. In particular with regard to pension products these divergences have already stimulated recent consultations by EIOPA[238] and the Commission[239]. Within the Expert Group the impact of those divergences has been estimated to exceed that of divergent contract laws.

Section 11: Impediments inherent in insurance contract law

233. However, the report has also disclosed a number of divergences between the insurance contract laws of the Member States which impede cross-border life insurance and/or certain marketing practices. Where divergences of tax law are less significant, e.g. when life insurance is used as a collateral in commercial transactions, such differences gain relative weight. Of particular importance are the divergent rules on the insurer's pre-contractual information duties and on the applicant's pre-contractual disclosure duties which render the online marketing of life insurance costly and/ or more difficult. Where courts subject insurers to the pre-contractual information duties relating to financial instruments, they require insurers to apply active contracting procedures

236 UK Financial Conduct Authority Handbook COBS 19.4

237 See Section 1 no. 2 and 8 Gesetz über die Zertifizierung von Altersvorsorge- und Basisrentenverträgen of 26 June 2001, Bundesgesetzblatt I, p. 1310. Regarding contracts that were concluded after 2011, the payout is permitted after the 62nd birthday only, Section 14(2) AltZertG.

238 See "Discussion Paper on a possible EU-single market for personal pension products", EIOPA/13/241 of 16 May 2013, https://eiopa.europa.eu/consultations/consultation-papers/2013-closed-consultations/index.html.

239 See "Consumer protection in third-pillar retirement products", a consultation paper of 11 April 2013, http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/swd_consumer_protection_thirds_pillar_pensions_en.pdf.

such as the profiling of the client which will impose a much heavier burden on a foreign insurer than on a domestic insurer. Divergent rules relating to the calculation of the surrender value and to the judicial review of pertinent contract clauses equally impair the possibility of selling and purchasing life insurance cross-border. Further the nature of pension arrangements in certain Member States, which separate the pension contract from the annuity combined with the difficulty of an insured to transfer assets between insurers in the same Member State, create difficulties for policyholders of third pillar pension contracts when they become habitually resident in another Member State. This difficulty arises as a consequence of the choice of law rules under the Rome I Regulation which is discussed more fully in section 2 of this Report[240].

234. Other rules have the effect of increasing legal uncertainty and complexity, and of raising costs of cross-border activities. They concern the withdrawal period and the consequences of cancellation, the drafting of questionnaires, the payment of premium and of the insurance money, and numerous details of the termination of the contract. How insurers manage these requirements is a business decision driven by their commercial approach and attitude to risk.

240 Regulation (EC) No 593/2008

Chapter V: Liability Insurance

Section 1: General considerations

a) The economic impact of liability insurance

235. From an economic point of view, liability insurance only accounts for a small part of the premiums collected in the European market. In fact, recent data shows that some 11% of the non-life insurance premiums are collected within this branch of insurance; moreover, it seems that, with reference to liability insurance, in 2011 (only) 26 billion Euros of premiums were collected in the European market which for these statistical purposes includes Switzerland, Norway, Iceland, Turkey and Liechtenstein[241].

236. Notwithstanding the minor economic importance of the sector in terms of collected premiums there is no doubt that liability insurance plays a much greater role for the insured parties, i.e. for enterprises, professionals and consumers who stipulate a liability insurance policy: in fact, when a liability insurance exists, they can better plan their future activities including their economic commitments and, consequently, realize a better management of the risk.

237. In addition to economic considerations, one has to focus on the social impact of liability insurances in various markets. It is common perception that liability coverage plays an essential role in facilitating exchanges between the economic players in EU markets. The importance of liability insurance is evident also in respect of both the policyholder and third parties: where voluntary, liability insurance has the main function of protecting the insured policyholder; where compulsory, the policy objective is to protect the victim in the first place. All in all, the significance of liability insurance is much greater than it may appear on the basis of the sole premium revenue of European insurers derived from this branch of insurance.

b) The complexity of liability insurance: private international law

238. Liability insurance is extremely "complex". This complexity is the result of many and heterogeneous factors: First, liability insurance generally involves more than two parties (policyholder, insured and potentially liable parties, beneficiaries, victims, etc.); second, a number of rules and provisions concern both the insurance contract and the contractual and extra-contractual liability in question; third, there is a specific connection with the local legislation relating to the liability risk covered.

239. The complexity of the matter emerges from two specific topics: the intersection of rules on liability insurance and the conflict of laws, and the delineation of insurance contract law and general liability law[242].

240. For what concerns private international law, the Rome I Regulation has provided important rules concerning the law applicable to non-life insurance activities[243], thereby mainly copying the Second Directive on Non-Life Insurance[244]; these provisions limit the possibility of the host Member State to impose substantive rules for cross-border contracts concluded with foreign companies or

241 Excluding reinsurance. For references see Insurance Europe, European General liability insurance report 2011, p. 2, in www.insuranceeurope.eu/facts-figures/statistical-series/nonlife/general-liability; see also data on the websites of the national associations of insurers.

242 See below subsection c, paras. 242 ff.

243 Art. 7 Rome I, see above paras. 72 ff.

244 See Arts. 7 and 8 of Second Council Directive (88/357/EEC) of 22 June 1988 on the coordination of laws regulations and administrative provisions relating to direct insurance other than life insurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, OJ 1988 L 172/1.

to enact choice-of-law rules leading to the application of a different legislation to the contract. Notwithstanding the said harmonization (if not unification) of rules, the applicable laws give rise to a number of problems and discrepancies which will be more thoroughly considered below[245].

241. As a further point of private international law, the Rome II Regulation has to be taken into account. It does not only designate the law applicable to the non-contractual liability covered by liability insurance. It is also of direct significance for insurers affected by cross-border activities of their policyholders since it determines whether a victim has a direct claim against the insurer of the liable person; this is the case where either the law governing the non-contractual liability or the law applicable to the insurance contract so provides[246]. Again, this conflict rule highlights the complex character of liability insurance resulting from its position between liability sounding in tort and insurance contract law.

c) The complexity of liability insurance: insurance contract law and general liability law

242. The preceding remark about direct claims makes clear that the insurer's liability in liability insurance may depend upon rules which form part of different areas of the legal system. A distinction has to be drawn between rules pertaining to national liability regimes and rules of insurance contract law. While differences between the former legal rules are not part of the mandate of the Expert Group, differences between national regimes of liability insurance contract law are within the mandate. For example, a rule establishing the liability of a physician vis-à-vis the patient is not within the notion of insurance contract law, contrary to the doctor's claim for refund against the insurer. On a similar note, a rule that identifies the recoverable damages for the victim of a tort does not form part of insurance contract law and of the Expert Group's mandate.

243. It follows that when dealing with liability insurance, many of the relevant rules existing at the national level cannot be qualified as "insurance contract law" in a narrow sense, as the insurance contract law is meant to regulate the relation between the parties of the insurance contract. In the field of liability insurance a thorough and comprehensive analysis of the insurance contract law cannot be pursued without having in mind the general legal system where those rules have to be applied and that are consequently relevant, both on contract terms and on costs, for the insurance contract.

d) The complexity of liability insurance: the legal regime

244. The legal regime of liability insurance results from different sets of rules which are to be taken into consideration. They include, first, the rules on insurance contract law; second, the rules on general liability insurance which apply to all types of liability insurance; third, rules applicable to all compulsory insurance (in some countries) as opposed to voluntary liability insurance; fourth, presence/absence of third party's direct claim, fifth detailed rules that are specifically provided for certain types of liability insurance such as the liability insurance required for specific professions. Once again, the resulting mix highlights the complexity of the legal regime.

e) The complexity of cross-border liability insurance: other factors

245. As pointed out by some members of the Expert Group there are further factors which may impede cross-border liability insurance. Insurers need expertise in the national law and in the characteristics of the host market in order to cover risk and to calculate premium: Examples mentioned relate to construction liability insurance and medical liability insurance. Depending on the countries, the lack of specific knowledge of the local market, the supervisory rules and – last

245 See below section 3, paras. 255-260.

246 See Art. 18 Rome II.

but not least – of the foreign language, allegedly represent the main obstacle to the decision to offer products in that market. The necessary knowledge can in some areas be procured by intermediaries whose activities may be seen as a positive factor favouring cross-border insurance in this context.

Section 2: Two examples of liability insurance

246. Manifold activities are covered by liability insurances: private activities of the policyholder and her/his family; professional services of various types of suppliers; ownership and driving of vehicles, vessels and aircraft; managerial decisions of directors and officers of undertakings. In these and other areas the liability insurance has to be tailored to the specific liability risks of the policyholder. Cross-border insurances raise particular problems related to the respective legal, economic and societal environment. Some of the resulting insurances are B2C transactions, others B2B including both large commercial risks and smaller risks such as the professional liability of a single practice physician.

247. Unable to enquire into all of these different liability insurances the Expert Group chose the professional liability insurance of lawyers and construction insurance as examples for other professional liability insurances such as those of the medical professions, of architects, engineers, tax advisers, and for liability insurances in general. The problems raised in other fields are not necessarily identical, but similar to the professional liability insurance of lawyers.

a) The professional liability insurance of lawyers

248. Professional liability insurance for lawyers exists all over Europe. In the overwhelming majority of the Member States[247] it is compulsory. In the three remaining countries where the law does not impose any duty to be insured it is voluntary. The duty to be insured, as well as the rules and characteristics of the coverage, arise not only by operation of the law, but also to a large extent from local (national) requirements (e.g. bar associations).

249. The provisions differ and give rise to problems concerning the free circulation of lawyers. Those who want to exercise the legal profession abroad often have to incur additional costs due to the difficulties in assessing the risk. This may also be the case where foreign matters are involved in domestic cases. For example, liability insurance contracts generally limit the coverage to losses arising from legal advice and assistance in matters governed by the national law of the lawyer's home country while in many cases lawyers have to argue and give advice referring to foreign laws. This can happen quite often, and not only in "frontier cases" involving foreign parties or legal services supplied outside the lawyer's home state, but also when a lawyer gives advice to domestic clients on foreign law that is applicable under the relevant choice-of-law rules.

250. As a result, lawyers who want to provide services cross-border are often compelled to take out professional liability insurance in more than one country which arguably increases costs and, in the final outcome, the price to be paid by clients. It should be noted, however, that the difficulty to have one single "portable" insurance contract does not depend merely on the differences between the applicable insurance contract laws, but the obstacles are also the consequence of specific requirements established by national laws of the lawyer's home state or the host state.

247 The opening of the internal market for legal services has favoured the adoption, at the national level, of rules requiring a professional liability insurance, although Art. 6(3) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ 1998 L 77/36, only entitles the Member States to require such an insurance, but does not require it itself. But even Member States which did not have a compulsory liability insurance regime for lawyers before have introduced it quite recently: see the case of Italy, as per Legge137/2012, in force since August 2013; in Germany the mandatory professional liability insurance was introduced for lawyers in 1994, see now Section 51 Bundesrechtsanwaltsordnung.

251. The economic consequences of the legal divergences thus include the absence of tailor-made products, i.e. single liability insurance policies providing cross-border cover[248], and high premiums for cross-border cover reflecting the difficulty for the insurers to price the risk. It is generally agreed that similar problems are common to other branches of liability insurance and to professional liability insurance of other professions in particular.

b) Construction insurance

252. Construction insurance often includes elements of liability for builders as well as financial guarantees offered by insurance companies to the constructor's/policyholder's customers. The latter guarantees are not classified as insurance contracts although they are part of the regulated insurance activity and have to be authorized under class "15" of Annex I to the Solvency II Directive[249]. Since they are not classified as insurance contracts, those financial guarantees can be offered as well by banks and other supervised financial institutions. For professionals involved in the construction activity such as engineers and architects there are different approaches which are outside the scope of this subsection.

253. A closer look at construction insurance in Europe shows the need to share information and data, and to have a clear survey of the different national solutions. This is documented by the existence of many research groups on the matter; in particular, the so called projects Elios I and Elios II must be mentioned[250]. The studies conducted at national as well as supranational level have confirmed that a number of elements of the respective construction environment influence the market and characteristics of construction insurance. One can mention the safety culture, the inclination to use prevention measures, the public financial support for private initiatives, the propensity to, and conditions for, the use of ecotechnologies, etc. In addition, and in result, very detailed legislation in the different Member States exists. Comparison between the different solutions may be difficult.

254. Here again, specific expertise in the local market is an essential condition for the decision to offer construction insurance cross-border. As demonstrated by the example of the builders' decennial liability and its cover in France and Italy[251], construction insurers tend to align their business model to the conditions prevailing in their home market and need to adjust to foreign market conditions before offering cover there. While it is agreed that obstacles to cross-border construction insurance are mainly caused by construction liability law, the result of the ELIOS project confirms that the existing complexity is in part also due to divergent rules of insurance contract law. This view is shared by some members of the Expert Group.

Section 3: The compulsory or voluntary nature of liability insurance

255. The demand for liability insurance may be voluntary, arising from the applicant's wish to reduce his/her risk. But the demand may also be imposed by legal rules which make the cover of a certain liability risk compulsory, thereby protecting those who suffer damage from the activities of the liable persons.

248 Those examples are well illustrated by the CCBE study (CCBE, SUMMARY of answers to the CCBE Professional Indemnity Insurance questionnaire 2009 http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Summary_of_answers_t1_1296464154.pdf) which confirmed that 32% of lawyers practicing cross-border have experienced difficulties related to obtaining professional indemnity insurance for their cross-border activities owing to the high premium arising from the difficulties to assess the risk and the need in many cases to have an insurance cover that complies with the requirements of the host Member State.

249 See Art. 15(2) Solvency II and Annex I class 15.

250 See, in particular, the first Elios report, in http://www.elios-ec.eu/sites/default/files/pdf/Eliosfinalreportfullversion.pdf.

251 See above para. 33.

a) Variety of compulsory insurances

256. There is a considerable variety as to what constitutes a mandatory or compulsory insurance. The duty to insure can be established by the law or by regulations relating to the exercise of a profession/activity. It may be laid down by the legislature, by state agencies or by professional bodies or other self-governing bodies. It sometimes forms part of a code of conduct which, although not binding in a strict sense, creates a standard of good practice the breach of which may be sanctioned by disciplinary or other measures. Where a professional self-governing body prescribes liability insurance, the stipulation of liability coverage is usually required for those registered with or subject to the professional self-governing body. Depending on the country in question non-performance of the duty to insure may result in the prohibition to exercise the profession. These differences are connected to the characteristics of the various markets, to the particular features of national legal systems of the Member States and to the needs of their citizens.

257. The number and types of compulsory insurances differ from country to country; only very few are prescribed by EU law, notably for motor vehicles[252], air carriers[253], maritime claims[254] and insurance intermediaries[255]. In addition there is a common core of liability risks subject to a duty to insure under the national laws of all or most Member States: it includes technical risks such as those of nuclear installations, oil pollution or space launching, but also liability risks arising from nature, e.g. from dangerous dogs or wild animals; a third group targets specific professional activities such as that of lawyers or architects. Even when a specific liability insurance is compulsory everywhere, the regulation of its content, in particular of the minimum insurance sums and the exclusions permitted, often diverges between the Member States[256]. Outside this common core there is a great variety of compulsory insurances. While their number is rather small in England and Wales as well as in German federal law[257], it is much higher in other Member States and amounts to almost 80 in Italy, 120 in France and around 400 in Spain.

b) The impact of legal differences on cross-border insurance

258. With regard to the cross-border supply of cover that is intended to match a duty to insure, specific problems of private international law arise. According to Art. 7(4)(a) Rome I insurance policies have to comply with the "specific provisions" of the law of the Member State imposing the compulsory insurance. In addition, a number of Member States, e.g. France, Germany and the Netherlands even have used the possibility of Art. 7(4)(b) Rome I by requiring that compulsory insurances shall be governed by their respective national insurance contract laws, thereby for example excluding the parties' choice of the applicable law even where it would otherwise be permitted[258].

259. The nature of the laws and regulations imposing a duty to insure is often not entirely clear. Many of the provisions in question are part of regulatory and professional regimes outside insurance contract law and may rather be viewed as regulations of the activity concerned. On the other hand, there are often detailed rules of contract law dealing with the rights and obligations of the parties under a contract that is intended to match the specific requirements of compulsory insurance; there are further rules which regulate certain aspects of the administration of the

252 See Art. 3 of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (codified version), OJ 2009 L 263/11.

253 See Art. 7 of Council Regulation (EEC) no. 2407/92 of 23 July 1992 on licensing of air carriers, OJ 1992 L 240/1.

254 See Art. 4 of Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims, OJ 2009 L 131/128.

255 See Art. 4 (3) of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, OJ 2002 L 9/3.

256 See already above, paras. 30 – 33 and below Chapter VI on motor liability insurance.

257 It should be noted that the Association of German insurers reports an additional number of 280 compulsory insurances at the regional level, often concerning the same activity in the 16 Länder.

258 For France see Art. 182-1 Code des assurances; for Germany Art.46c (2) EGBGB (Introductory law of the Civil code); for the Netherlands see Art.10:156 Burgerlijk Wetboek.

contract, for example its renewal and termination. Where such rules exist, a contract that is not in line with them will hardly be considered as valid in the courts of the respective Member State. In light of these findings the legal nature of compulsory insurance may appear as a hybrid, composed of elements of public regulation and insurance contract law.

260. Again, the rules on compulsory insurance give evidence of the detailed, specific and complex character of liability insurance. They can create uncertainty for both policyholders and insurers already in a domestic context and even more so for foreign insurers and their customers in cross-border insurance. It is often difficult or even impossible for them to identify the "specific provisions" that their contracts have to comply with under Art. 7(4)(a) Rome I. The further existence of multiple differences between the national laws, combined with the difference in risk, creates costs for insurers as they cannot simply adjust the contract of their home market but can be required to draft entirely new contract terms in accordance with the law of the targeted market.

Section 4: Occurrence-based v. claims-made policies

a) The "trigger" of the insurer's liability

261. An essential issue in liability insurance is the determination of the time-frame of cover: Is it dependent on the acts (or omissions) that give rise to the policyholder's liability? Or on the losses resulting from those acts becoming manifest? Or on a claim raised by the person suffering loss against the policyholder? Or on the lodging of a claim by the policyholder against the insurer? Long periods may elapse between these points in time. As demonstrated by the asbestos cases in particular, damage resulting from the workers being exposed to asbestos materials in the 1950s and 1960s sometimes surfaced only 15 or 20 years later, and it took some further years before claims were brought against the former employers who would then try to take recourse against their liability insurers of 20 years before. The time-frame of the insurer's liability thus may be an extremely important part of the definition of the insurance product and may adopt various forms depending on the beginning and end of cover. The contract terms defining this period are usually referred to as "triggers" of cover. In fact, triggers and in particular the alternative of claims-made or occurrence-based liability are key elements for insurers to control their exposure; in addition, the choice to adopt one system or the other is a fundamental condition of financial capacity to adequately cover long-term risks.

262. The definition of triggers of the insurer's liability in consecutive contracts may create periods of overlap between the former and the subsequent contract, but it may also give rise to a vacuum or lack of cover in between. Assuming for example that a liability insurance contract ending on 31 December 2013 covers all claims made against the policyholder by that date and that the cover under the subsequent liability insurance contract refers to the policyholder's acts committed after that date, it may turn out that losses resulting from the policyholder's damaging conduct in late 2013 are not covered because they were too late for the preceding contract and too early for the following contract. Therefore, the law has not been indifferent to choices of the market and has intervened either by legislation, or by way of case-law.

b) Divergent legal rules

263. There are Member States that allow claims-made policies in both B2B contracts and in B2C contracts. Other States such as France allow claims-made terms in B2B contracts under certain conditions, but provide, by imperative statute law, that the insurer's liability has to be based on the occurrence of the damaging facts where the policyholder's private, i.e. non-professional liability is insured[259]. Thus claims-made policies are not permitted in B2C liability insurances. For B2B liability

259 See art. L 124-5 (1) Code des assurances.

insurance contracts the French law requires a post-contractual notification period that allows the policyholder to lodge claims arising from conduct occurred before the end of the contract, within a period of five years thereafter; for the liability insurances of many professionals the post-contractual period is even ten years[260]. In the Netherlands there has been some debate and there are still some discussions on the new Art. 7:942 Dutch Civil Code which came into force on 1 July 2010. This article stipulates that a claim can be made within a period of 3 years after the moment the insured claimant "became aware of its claimability". The general conclusion is that claims made is permitted provided the phraseology in respect of this basis of coverage is clear enough as part of the policy wording and not of a claims notification period clause, unless this would lead to an unfair outcome.

264. In other countries such as Italy and Germany, a claims-made clause is basically valid, but subject to judicial review under the rules on unfair contract terms. For example, in a German case[261] on the subject, the court ruled that contract terms restricting the liability period of the insurer to claims made before the end of the insurance contract period are valid provided that other elements of the contract compensated the said restriction. Such other elements may be the retroactive cover granted by the contract, the policyholder's possibility to notify, before the end of the insurance contract, events which may result in claims to be made against the policyholder later-on, or a post-contractual notification period. As a result, the decision on the appropriate trigger in a liability insurance contract is difficult already at the level of national law.

c) The impact of legal differences on cross-border insurance

265. There is no uniform view as to the impact of the legal differences outlined above on cross-border liability insurance. On the one side insurers appear to consider the possibility of selling cover on a claims-made basis as crucial, but they assert that they are able to take account of restrictions of the host state by pricing them in. Therefore the choice of the triggers used in the contract is said to be a commercial one, taking into consideration the client and the type of risk in question. From this perspective legal restrictions are not considered as obstacles to entering a foreign market. On the other hand this line of argument is premised on the existence of clear rules such as those of French law. Where such a clear rule is lacking, cross-border insurance[262] on a claims-made basis may become very costly since insurers are not able to predict which risks they may be obliged to cover.

Section 5: Extent and characteristics of the cover

266. When talking about the extent of cover, the topics under discussion may relate to very different issues: (minimum) insured sums, exclusions, cover for expenses for judicial and extrajudicial costs, deductibles, performance in kind instead of money are just some of the many examples of possible differences in the concrete coverage and limits of liability insurances. Some of these elements are strictly connected with the local legal systems and, more specifically, with rules that establish and regulate the liability in question. For example, there is an obvious link between the rules on the extent of cover and the law which governs liability and renders liability insurance mandatory requiring specific protection of the victim. Some specific aspects of the extent of the coverage have been considered.

260 See Art. L 124-5 para. 5, 1st sentence and art. R 124-2 Code des assurances.

261 OLG München, 8 May 2009, case 25 U 5136/08, Versicherungsrecht 2009, 1066.

262 This would also apply to domestic insurance.

a) Insured sums

267. There are laws that set out clearly a minimum insured sum for compulsory insurance, or for some specific kind of compulsory insurance. There are other countries where there are no minimum insured sums for the same kind of insurance. Those differences may make it difficult for an insurer from the second category of countries to enter the market of a Member State belonging to the first category. If the policies offered by this insurer in its home Member State do not match the requirement of a minimum insured sum in the host state, the insurer will likely have to adjust the product and for instance provide a higher sum insured. This can create costs on the side of the insurer and the insured; nevertheless, one has to acknowledge that the amount of the minimum sum set by the law (if any) is strictly influenced by considerations relating to the awards made to victims in a specific country.

268. An example can clarify what has been said: in medical malpractice cases, the average indemnisation of victims is set at relatively high sums in the UK and Italy; therefore, the minimum liability insured will be of 5 million Euros. In other Member States damages awards for victims might be significantly lower as a result of different cost levels in the medical sector and/or of a different valuation of injuries as well as pain and suffering. As a consequence the minimum insured sum required in compulsory professional liability insurance will be lower as well. An insurer operating in such a country will have to adjust its professional liability insurance to the higher minimum sums in Italy and the UK if it wants to enter those markets. Moreover it will probably have, in order to fix the premium, to enquire the average liability awards made in those countries and incur costs for that and other purpose.

b) Cover for expenses for judicial and extrajudicial costs

269. With reference to recoverable expenses for judicial and extrajudicial costs, a comparative survey can equally show important differences in the national legal solutions. In the UK provisions on legal expenses are typically part of the standard terms in full indemnity insurance, e.g. an insurance on property covering the policyholder's liability as well[263]. Such policies often contain a clause whereby the insured is bound to take all necessary steps to avoid or mitigate the loss in the interest of the insurer. Where such a clause is included or implied in the liability insurance contract, the reimbursement of legal expenses forms part of his/her claim against the liability insurer. However, in the absence of a clear contract term, clauses on the extent of cover can be interpreted differently by judges in Member States which may create obstacles. Moreover, courts in other jurisdictions may not agree that such a standard clause entitles an insured to conduct litigation at the expense of the insurer unless the insurer expressly agreed. A question can arise whether there is a full indemnity or not which could also affect the application of such a clause.

270. In other countries, especially those with a civil law system, the law lays down minimum provisions for the indemnification of judicial and extrajudicial costs. Italy, for example, provides for a mandatory rule in the Civil code requiring the insurer to reimburse legal expenses up to an amount equivalent to 25% of the insurance sum[264]. Under the German Insurance Contract Act, the insurer has to provide cover for necessary legal expenses as well; the law explicitly points out that the insurance sum agreed is not a cap for those costs[265]. It follows from the differences that insurers interested in offering cross-border cover would have to adapt their product. Assuming an Italian insurer intending to enter the German market would have to take into account the legal

263 Regarding the purpose of legal expenses as part of a standard UK property insurance policy, this cover is generally designed to cover a variety of different legal costs that the policyholder may incur. These can include those related to damage caused to third parties by the policyholder or their property. It can also cover legal costs related to disputes with neighbours etc., even if the policyholder is the prosecutor. They can even extend to include the cost of disputes with an employer or employee.

264 See Art. 1917(3) Codice civile.

265 See Section 101(2) VVG. For Italy, see always Art.1917 CC.

costs exceeding the 25% threshold of Italian law, this would be a factor that renders the calculation more uncertain, thereby generating costs.

c) Deductibles

271. Deductibles are generally set in the contract in order to reduce moral hazard and to make the insured participate in the risk. They can also have an impact on the premiums. The nature, limits and types of deductibles applied are influenced by the type of risk in question, according to the technical choices of the insurers. Even if deductibles are in the majority of the cases the result of contractual negotiations, or are at least provided in standard forms for mass risks, some differences in law exist. In fact, there are cases in which specific deductibles are imposed by the law in order to limit moral hazard[266].

272. All in all, the rules on the extent of cover differ among Member States. The differences have an effect on the insurer's exposure to risk and thereby affect the premium calculation. While these differences would not necessarily stop an insurer to distribute his product cross-border, the provider would have to adapt the product itself. The adaptation of the product causes costs, in terms of legal fees for consultancy, adaptations of the standard forms, etc. The concrete extent of these costs might be minor if compared to other "extra" legislative costs, but still they exist and are part of the insured premium payable by the policyholders.

Section 6: Causation and mitigation of loss

273. Different rules on causation and mitigation of loss add complexity and uncertainty. They can also affect the pricing of cover. However, according to majority of the Expert Group, the differences are probably not so significant as to cause an insurer to refrain from offering its products cross-border. A minority of experts insisted that rules on mitigation of loss, in particular, go to the heart of the balance of the insurance contract and are generally regulated by the law. It should also be recalled that a particular type of mitigation costs, namely the policyholder's legal expenses caused by his defence against the third party's claim have been dealt with separately[267].

274. Differences between the laws of the Member States exist and they can influence the costs of the insurance product. Moreover, as the analysis should be conducted having in mind all the players in the insurance sector, different rules – especially for what concerns premium increases in case of the insured event, may have the effect of significantly modifying the policyholder's right to receive compensation. Consequently, different rules result, in the end, in a different treatment of the insured "by way of applicable law". In other words, consumers and professional clients in the EU may have a different degree of protection in accordance with the applicable laws.

Section 7: Direct claim of the third party

275. Contracts give rise to mutual rights and obligations of the parties. Third parties are not privy to the contract and are therefore not entitled to bring a claim under a contract unless they benefit from a contract concluded for the benefit of a third party. The grant of a direct claim to a third party against the liability insurer therefore goes right to the center of contract law and to the essentials of liability insurance. This claim is in fact strictly connected to the position of the victim and it is crucial to look at the rights victims have towards the insurer of the liable party.

266 For D& O Insurance in Germany see Section 93 (2) 3 Stock Corporation Act (AktG), see also Paul Melot de Beauregard/Christian Gleich, Aktuelle Problemfelder bei der D&O-Versicherung, NJW 2013, 824

267 See above, paras. 269 ff.

276. With reference to the existence and characteristics of direct action, different solutions and models exist in EU Member States. In some Member States such as France or Spain a direct claim is always allowed[268]. In other words, as a general rule, the law allows third parties having suffered loss from an act of the policyholder to bring a direct action against the liability insurer of the liable party. In other countries, direct claims are permitted only by way of exception. But notable differences exist. In Sweden third parties have a direct claim in all compulsory liability insurances and in voluntary liability insurances where the policyholder is insolvent or a wound-up corporate body[269]. In Italy only some specified (not all) compulsory insurances may give rise to direct claims of the third party[270]. In Germany the law provides for a direct action only in the case of motor liability insurance and in other compulsory insurances only when the policyholder is insolvent or his residence is unknown[271].

277. The conclusion drawn from the survey over these divergent laws is that the presence/absence of direct third party claims may create costs of different nature like costs of procedure, costs in order to draft dispute resolution rules in the contract, costs of investigation where a claim is brought by a person who allegedly suffered loss from the conduct of a policyholder, etc. While these costs may have an impact on the calculation of premium it is unlikely that they deter an insurer who would otherwise enter a foreign market from doing so. This conclusion is even more justified as insurers must face direct claims unknown in their home legislation also in purely domestic cases: Where domestic policyholders have caused an accident abroad the aggrieved party may bring a direct action against the policyholder's insurer provided that the law applicable to the extra-contractual liability under the Rome II Regulation allows such direct action.[272]

Section 8: Conclusions on liability insurance

278. Liability insurance is a complex undertaking. The legal provisions relevant in this field partly belong to national liability regimes which are outside the Group's mandate, and partly belong to insurance contract law. Provisions on the large number of diverse compulsory insurances have a hybrid nature resulting from public regulation and insurance contract law.

279. An insurer's decision to offer liability cover in a given market very much depends on its knowledge about the characteristics of the risk in that market, i.e. relevant statistics, the average costs of insured events in the various sectors, the inclination towards fraud, habits and risk-aversion or risk-proneness of targeted customer groups, etc. Consequently insurers intending to enter a foreign market are compelled to acquire the relevant expertise first. The applicable rules on insurance contract law are only one element alongside others; they do not appear to be the main element.

280. The existence of divergent insurance contract laws on liability insurance adds to the complexity created by other differences. This notably applies to the various differences concerning compulsory insurances, e.g. different minimum insurance sums, to the uncertainty about the "specific provisions" which an insurance contract possibly governed by a foreign law has to comply with in a host state, to rules on the mitigation of loss, in particular on the cover of legal expenses, or the unclear regime of the time-span of the insurer's liability, i.e. the validity of contract clauses providing for "claims-made" cover. Since many legal provisions in this field are of a mandatory

268 See Art. 124-3 Code des assurances, Art. 76 Ley 50/1980 de contrato de seguro

269 See 9 kap. 7 § Försäkringsavtalslag (2005:104).

270 This is the case, for example, for motor liability insurance, but not for other forms of compulsory liability insurance.

271 See Section 115 VVG.

272 See Art. 18 Rome II and above, para. 193; under Arts. 9 and 11 Brussels I on the injured party may even lodge such direct action in the courts of the Member State of his/her domicile, see ECJ 13 December 2007, case C-463/06 (FBTO Schadeverzekering v. Odenbreit).

nature, the differences cause costs and uncertainty. In addition to the important factors mentioned above they represent obstacles to cross-border insurance.

Chapter VI: Motor Insurance

Section 1: Introduction: Economic data and framework

a) European motor insurance market

281. In 2011 European motor insurers generated a total premium income of €129bn, compared to €124bn in 2010. This corresponds to a growth of 4%, against +1.2% in the previous year. The growth rate reflects a number of changes which are due to intense competition in the market: the offer of services in addition to traditional cover (e.g. assistance), of new products (e.g. cover for occasional drivers) and of more advantageous policy conditions (e.g. no change in Bonus/Malus for drivers who have had few accidents, profit sharing)[273].

282. The most significant condition for insurers wishing to enter a motor insurance market lies in the assessment of the local environment into which they want to sell in order to price their products based on risk analysis. And this necessity applies irrespective of whether insurers are transnational or functioning merely on a local basis. Although this analysis will obviously include the local contract law, it will be based on the wider local framework relating to the market in question, in particular the intensity of competition and the pricing system applied; statistical data on accidents, claims settlement practices, average costs of repair, medical services etc. reflecting e.g. road safety, driving culture and consumer habits; the general or particular liability regime resulting from civil law, the law of evidence and other procedural rules[274]; the system of social security and taxation.

283. National differences on these points may be major obstacles to cross-border insurance. To illustrate what has been said above one may refer to the UK which has seen a massive increase in whiplash claims, many associated with fraudulent claims. Any insurer intending to insure motor risks in the UK will need to have a detailed understanding of both the liability and quantum risks associated with whiplash in order to price its products correctly - indeed to determine whether it wishes to underwrite the risk at all.

284. There is a consequent need in practice for local presence in the target market to carry out that assessment, but also in order to provide services to policyholders, in particular in claims regulation and practices. This need is also evidenced by the requirement of a 'claims representative' in each Member State as required under Art. 21 Motor Insurance Directive 2009/103/EC[275] as well as a 'correspondent' established under Art. 4 of the Internal Regulations of the Green Card System. Additionally, insurers need to have local arrangements to effectively manage claims, for example, with garages for repairing vehicles and road-side assistance services and it can take significant time and investment to establish such networks where the aim is to offer a product cross-border.

273 All the previous information is according to Insurance Europe's "Statistics N°46: European Insurance in Figures", published January 2013, and available at: http://www.insuranceeurope.eu/uploads/Modules/Publications/eif-2013-final.pdf .

274 See the Report elaborated for DG Markt "Compensation of victims of cross-border road traffic accidents in the eu: comparison of national practices, analysis of problems and evaluation of options for improving the position of cross-border victim" http://ec.europa.eu/internal_market/insurance/docs/motor/20090129report_en.pdf.

275 Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, OJ 2009 L 263/11.

Section 2: EU harmonisation

a) The legal framework

285. Five directives have been adopted on motor insurance which are consolidated in Motor Insurance Directive 2009/103/EC. In accordance with Art. 3 of the Directive the insurance shall cover civil liability in respect of the use of vehicles normally based in the territory of a Member State. In addition to the liability arising under the laws of that State it shall also cover, according to the law in force in other Member States, any loss or injury which is caused in the territory of those other States. Both damage to property and personal injuries of all persons other than the driver are included in the compulsory cover. A number of exclusions are void under Art. 13 of the Directive. Whereas some other provisions of this Directive can be considered as full harmonisation, Art. 9 only prescribes minimum amounts for third-party liability insurance cover in EU Member States.

286. Any third party injured as a result of an accident caused by a vehicle enjoys a direct right of action against its insurer under Art. 18. Thus, where a vehicle, being used outside the Member State where it is based, is involved in an accident, a third party injured in that accident is entitled to a direct claim against the foreign liability insurer. This claim which will usually be governed by the law of the place of accident may be brought, under Art. 11(2) Brussels I, in the court of the domicile of the injured person[276]. Thus, motor liability insurers have to take into account the liability and procedural laws of foreign states already under the present law, although statistically only in a small portion of all cases.

287. Based on Art. 22 Directive 2009/103/EC, Member States have adopted provisions to ensure that a reasoned offer of compensation is being made to the victim within three month after s/he presents the claim and, where the offer is not made, interest shall be payable on the amount of compensation offered by the insurance undertaking or awarded by the court to the injured party. In Italy these measures have been strengthened by imposing administrative sanctions on insurance companies in case of offers made after the lapse of the short period provided by the law. However, Directive 2009/103 does not deal with the issue how the insurer has to respond where liability is denied; Members States have responded differently with laws seeking better protection of the consumer[277].

288. Other provisions relate to various issues: vehicles should be registered in the country of permanent residence of the policy holder and/or vehicle owner; provided their registration is in order, they may be insured by an insurer established in the country of registration or in any other EU country by freedom of services (FoS); insurers providing cross-border insurance services must fulfil certain formalities.

289. The benefits of the Green Card system in Europe reflected in this Directive must also be highlighted. The Green Card system was first established in 1949 and has now been joined by more than 40 countries. The purpose of this system is to protect victims of road traffic accidents involving foreign motor vehicles from those countries. Motor Insurance Directive 2009/103/EC further provides for cooperation between national insurers' bureaux as per Art. 6, which helps facilitate compensation in such cross-border cases. Chapter 4 of the Motor Insurance Directive 2009/103/EC moreover outlines the compensation procedure for damage caused by an unidentified vehicle or a vehicle for which the insurance obligation has not been satisfied, which is then handled by the national guarantee fund in accordance with Article 25. Italian law regulating the contents of compulsory motor liability insurance including the premium was upheld by the ECJ as a restriction

276 ECJ 13 December 2007, case C-463/06 (FBTO Schadeverzekeringen v. Odenbreit), [2007] ECR I-11321.

277 French law and its interpretation in case-law may result in the situation that the sanction of the insurer who initially contests the responsibility of the policy holder but whose stance is later denied by the courts consists of a (double) penalty both for late offer (L 211-13 of French insurance legislation – code des assurances) and for clearly insufficient offer (L 211-14).

of the freedom of establishment and the freedom to provide services, justified by the protection of consumers and victims of road traffic accidents[278].

b) Compulsory liability insurance

290. Motor insurance consists of two main categories, namely third party liability motor insurance and comprehensive motor insurance (own damages); only the former category is compulsory under EU law[279]. As pointed out before, motor liability insurance is the most widely spread liability insurance in all the EU. Since it is a specific type of liability insurance, the conclusions made in the chapter on liability insurance apply here as well. That is to say, rules on liability insurance are often very detailed, specific and complex. They can create uncertainty for both national and foreign insurers and raise costs of market entry for the latter[280].

291. As under other liability insurance policies, motor third party liability insurers must also compensate for the additional costs of defence and legal advice: the costs of providing legal and/or risk assessment experts for the foreign jurisdiction, conducting transactions in the language of the foreign jurisdiction, obtaining and analysing risk data from the foreign jurisdiction, and so forth. Differences between the national laws concerning the insurer's contractual obligation to grant cover for such expenses have been identified as generating uncertainty[281]. It is moreover necessary for insurers to safeguard their ability to cover these costs without failing to comply with legislative solvency requirements and their financial obligations to investors (i.e. in the form of returns), both of which are intended to secure insurance capacity for the cover of potential claims.

292. According to Directive 2009/103/EC motor liability insurance is a compulsory insurance in all Member States. Where insurance policies covering such risks are concluded on a cross-border basis, they must comply, according to Art. 7(4) (a) Rome I[282], with the specific provisions of the law of the Member State imposing the compulsory insurance (namely, the Member State where the car is registered) which, in the case of motor insurance, may be very detailed. Moreover, some Member States (e.g. France, Germany, and the Netherlands) have made use of the option granted by Art. 7(4) (b) Rome I and require the whole liability insurance contract to be subject to their own law. This leads foreign insurers entering the market to adapt the policies used in their respective home countries.

c) Cross-border activity and pan-European Prospects

293. This is the main reason why when offering motor third party liability insurance, any development of a suitable and effective cover must entail a thorough analysis of the host Member State's motor liability law as well as the legal processes and administrative procedures of the jurisdiction in which the policyholder's insured activities take place. Considering this, not all insurers may be entirely capable (either in terms of financial capacity and/or expertise) to cover foreign risks or else have the risk appetite (i.e. business strategy) to offer products in a foreign market. Regardless, there are multinational insurance companies offering multi-State motor third party liability policies through local affiliates as well as local insurers that can offer endorsements and/or extensions to accommodate customers driving cross-border. Insurers may work with their policyholders to custom-design a policy or policy extension that adequately covers their potential risk exposure in the foreign Member State. As a result, only large motor insurers operate in multiple

278 European Commission v. Italian Republic of 28 April 2009 (Case C-518/06), judgment of the Grand Chamber.

279 It is referred to as a 'third-party' cover since the beneficiary of the policy is someone other than the two parties involved in the contract (the car owner or the driver and the insurance company). In most Member States, the policy does not provide any benefit to the insured. However, it covers the insured's legal liability for death/disability of third-party loss or damage to the third-party property. Some Member States, however, use a first party cover. For instance, in Sweden motor third party liability insurance also covers personal injuries suffered by the driver (who often also is the owner and policy holder) of the vehicle. On a voluntary basis insurers also may offer a "comprehensive cover" that is an add-on to the mandatory third party cover and protects the car owner or driver from financial losses, caused by damage or theft of the vehicle.

280 See above chapter IV.

281 See above paras. 269-270.

282 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6.

Member States. Because risk calculation and business processes cannot be combined across national boundaries, the most expedient way of doing so is to form or acquire a separate company in the relevant country.

294. At this time there appears to be no concrete evidence that there are pan-European products concerning cross-border motor third party liability insurance. Because of Art. 7(4)(b) Rome I and the requirement imposed by some Member States that the liability insurance contract must be subject to their own law it is not possible to conceive of a pan-European motor liability policy which is the same in all Member States. What may be possible is the “export” of a policy governed e.g. by Spanish law, to Italy which does not require that the policy be subject to Italian law but simply insists on compliance with “specific provisions”, Art. 7(4)(a) Rome I; to the extent that such specific provisions are susceptible of being complied with by the Spanish insurer, it may sell its policy in Italy as well. And of course, the large players may offer, through their subsidiaries (FoE) in the various EU Member States, motor liability cover under the respective national law of the host state. But such policies would not be identical and cover cannot be addressed as “pan-European”.

295. To the contrary, motor insurance is a highly competitive national market with a variety of insurance products available to European consumers within their respective countries. Beside the possible obstacles mentioned in the following sections, there appears to be no evidence suggesting that insurance contract laws on their own are impacting the availability and/or provision of insurance to the point of hindering users’ freedom of movement, or establishment or freedom to provide services[283].

Section 3: Possible contract-law related obstacles of cross-border motor insurance

a) General considerations

296. The compulsory nature of motor liability insurance explains that insurers wanting to offer motor insurance abroad must be aware of, and must comply with, a large number of legal provisions of the host country. As pointed out above this follows from Art. 7 (4) Rome I. Thus, products must be adapted to the legal requirements of the specific markets. In Poland and in Spain, for instance, compulsory motor liability insurance is fully regulated by mandatory provisions. Therefore, motor insurance contracts often directly refer to the respective insurance law provisions. In Belgium, standard contract terms for motor insurance are prescribed by regulation; in Germany, they only have to be submitted to the supervisory authorities. Therefore, no prior approval takes place, but only a partial regulation exists. But insurers must of course comply with it as well. Foreign insurers when entering the relevant market would meet additional operational costs, for instance costs for legal advice, for adaptations and modifications of their contracts and for IT adjustments.

297. In addition there are some non-contract law related requirements arising from public law. They relate for example to fraud prevention, to the registration of vehicles, or to claims settlement practices. For instance, in Spain more than 90% of the claims in motor insurance liability are handled through them [284]. Other requirements have a hybrid nature. For instance, German insurers of small motorbikes can hand out the number plates (public law element) only once the money has been paid (contractual counter-performance regulated by contract law) by the insured. Another example concerns a mandatory Austrian rule according to which when the insurer sends the declaration of cover to the registration office. This means at the same time that the insurer grants cover to the policy holder.

298. The analysis of possible contract law related obstacles is complicated by the difficulty in defining whether a potential obstacle is related to contract law or better described as a potential

283 For more information about this conclusions see the research made by DG Markt: Retail Insurance Market Study, MARKT/2008/18/H

284 See Memoria Social del Seguro Español 2012, p. 157 http://www.unespa.es/adjuntos/fichero_3575_20130521.pdf.

obstacle deriving from the national regime which applies, for example, to issue of licences or local formalities.

b) Minimum amounts of coverage

299. Art. 9 of the Motor Insurance Directive 2009/103/EC provides that without prejudice to any higher guarantees which Member States may prescribe, each Member State shall require third party liability motor insurance to be compulsory at least in respect of the following amounts:

- in the case of personal injury, a minimum amount of cover of €1,120,000 per victim or € 5,600,000 per claim, whatever the number of victims;
- in the case of damage to property, €1,120,000 per claim, whatever the number of victims[285].

The amounts Member States have introduced as minimum amounts differ to a significant extent: for personal injury between €481,000 in Croatia and unlimited coverage in Belgium, Finland, France, Ireland, Luxembourg and the UK, for damage to property between €206,000 in Croatia and unlimited coverage in Luxembourg[286].

300. It is not clear that these differences constitute an obstacle for a foreign third party motor liability insurer, coming into one of the markets with mandatory rules establishing higher or even unlimited coverage. For a foreign insurer this could make it more difficult to enter into these markets as the insurer would be bound by the unlimited amount. Furthermore, not only the amount and level of compensation awarded in the different Member States, but also the legal differences concerning the manner of compensation (e.g. in a lump sum or in instalments and pension annuities), may constitute a reason for motor insurance not to be sold cross-border. However, insurers are used to adjusting their prices by taking into account different levels of coverage. The relevant criteria for pricing are primarily of a factual or statistical nature: the important points include the number of claims (claims frequency), the amount of damages awarded in national courts, the costs of medical services, spare parts, car repairs and rental cars for replacement, and the liability regime. The higher economic development in a country will usually lead to higher claims amounts. It follows that entering a foreign market without such adaptation will give rise to difficulties.

301. It is not clear that different minimum levels of compensation, per se, are a cost or obstacle to cross border motor insurance because the level of minimum coverage in each Member State is readily ascertainable and the level of premium easily adjusted.

c) Scope of cover

302. Some further legal differences are potential obstacles to cross-border motor insurance. Thus, certain non-harmonised restrictions of coverage (exclusions) are subject to different national regimes. For instance, certain exclusions (e.g. in German law the exclusion of cover of the policyholder's liability for contractual claims) are allowed in some Member States, while they are prohibited in others. Moreover there may be different regimes concerning the sanctions of the duty to take precautionary measures. Different limitations of the insurer's recourse against the policyholder after payment of direct claims to third parties may lead as well to different risk assessments and therefore differences in premium calculation as well.

303. There are also differences in the positive mandatory content of coverage (compulsory inclusions), for instance relating to the inclusion of legal expenses or the obligation to insure several drivers. For an insurer, coming from a country like for instance the UK where no such extension of coverage exists into, for instance, the Austrian market, where such coverage is

285 See for the revised amounts: Commission notice regarding the adaptation in line with inflation of certain amounts laid down in the Motor Insurance Directive 2009/103/EC (2010/C 332/01), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:332:0001:0001:EN:PDF.

286 For more detailed information about the different coverage amounts per Member State see http://www.versicherung-und-verkehr.de/auto/unfall/unfall-im-ausland/deckungssummen.htm.

mandatory, this would change the content of the product and therefore cause costs under the policy.

304. Differences between national rules creating mandatory preliminary coverage or other requirements for registration need to be built into the product. This leads to a different content of the product on these points. Examples include the necessity of provisional coverage for registering a car and the possibility of seasonal registration in Germany.

d) Bonus/Malus systems

305. Bonus/Malus systems are very common in motor insurance. A bonus is a discount in the premium which is given on the renewal of the policy if no claim has been made in the previous year. A malus is an increase in the premium if there has been a certain number of claims in the previous year. Bonus/Malus systems differ between Member States[287] and in numerous countries even between insurers since they are largely subject to voluntary regimes established by insurers.

306. In France and Luxembourg, the Bonus/Malus systems are regulated by the law[288], whereas for example in Germany[289], in Spain, the UK and the vast majority of other Member States, this is not the case. In the latter countries, insurers are free to decide whether and if so which Bonus/Malus system they offer[290]. In most Member States, Bonus/Malus are offered as a result of insurers' commercial decision to do so in a competitive environment. In the other Member States, a regulated Bonus/Malus system contributes to market fluidity which is highly appreciated by consumers. The only contract-law related obstacle arising in relation to Bonus/Malus would concern a scenario where an insurer from a market with no regulation of Bonus/Malus systems like the UK not offering any similar Bonus/Malus in its home State on a voluntary basis, enters a market where there are mandatory Bonus/Malus rules. Having to provide a mandatory bonus could, in such instances, affect the premium calculation.

e) Other specific mandatory national rules

i)Form requirements

307. In some Member States (for instance Italy[291], Bulgaria or France) certificates need to be delivered as original on paper. For instance in Italy, Bulgaria and France the insurance cover has to be evidenced by a sticker attached to the windscreen of the car. These additional formalities create costs and make online distribution more onerous. By contrast, other countries, e.g. the UK, allow electronically produced evidence. In the UK more than 50 % of motor insurance is sold via comparison websites. Therefore for instance a UK insurer wanting to enter the Italian market would face a fairly major impediment for its business model and vice versa.

ii) Compulsory risk acceptance and offers

308. In some Member States (e.g. Germany, Italy or France via the intervention of the *'bureau central de tarification'*), all insurance providers, including incoming foreign insurers, are obliged to accept risks (i.e. the insurer is obliged to accept any applicant whom the insurer would otherwise reject). For example in Belgium, contractual freedom for the insurer to accept or refuse to conclude a determined contract is limited by the concept of abuse of rights and the requirement that any difference of treatment has to be objective and reasonable. In Poland, if an insurer does not reply

287 See in this context also the following judgments of the European Court of Justice in which the Court ruled on the compatibility of national bonus/malus systems with the fundamental freedoms: ECJ 7 September 2004, case C-346/02 (Commission/Luxemburg), [2004] ECR I-7517; ECJ 7 September 2004, case C-347/02 (Commission/French Republic), ECR [2004] I-7557.

288 See Art. L 111-4, A 121-1 of the French Insurance Code. Luxembourg: Loi du 16 avril 2003 relative à l'assurance obligatoire de la responsabilité civile en matière de véhicules automoteurs; Art. 11 Règlement grand-ducal du 11 novembre 2003 pris en exécution de la loi du 16 avril 2003 relative à l'assurance obligatoire de la responsabilité civile en matière de véhicules automoteurs.

289 In Germany, the Association of Insurers (GDV, Gesamtverband der Deutschen Versicherungswirtschaft) has developed a bonus-malus system which most insurers follow.

290 See for details: Monir Taik, Mitgliedstaatliche Grenzen der Gestaltung von Versicherungsprodukten im Europäischen Binnenmarkt für Versicherungen, Berlin, 2012, p. 55 ff.

291 It must be said, though, that pursuant to Decree n.110, dated 9 August 2013 of the Italian Ministry of Economic Development, within the period of 2 years the paper certification named "contrassegno" will be substituted by an electronic evidence stored in a dedicated data-base.

within a specified period of time, the contract is deemed to be concluded between the applicant and the insurer at the premium resulting from the regular pricing system and the insurer shall not charge a higher premium in return for a risk that is perceived to be higher than average. Other Member States have established a fund or an institution, the costs of which are partially borne by insurers in order to ensure access to insurance to every applicant. As a result an insurer from a fund/institution-type Member State of the second category that enters a foreign market of the first category would have to pay into the fund or institution in its own country of establishment while at the same time being obliged to accept any applicant in the Member State of the former group.

309. In Italy, a mandatory duty imposed upon insurers to offer 'basic contracts' is an obstacle for foreign insurers because the foreign insurer needs to adjust its offer. The purpose of this rule is that all insurers offer a basic simple product which would be easy to compare and thus would encourage competition. When required to comply with this rule, foreign insurers would face an obstacle, as they would have to adjust their product offered so as to ensure that they offer the basic product required in Italy and even to define what should be considered as “basic”. Moreover, there is also an obligation in Italy to provide a personalised quote that also applies to foreign insurers with the effect of being an obstacle for them as it is causing additional costs.

iii) Review of unfair contract terms

310. Differences between the unfairness control regimes may also render cross-border insurance more costly. This applies in particular to the different views on the validity of premium adjustment clauses including indexation clauses which are more difficult to design for motor insurance than for other insurance sectors. As the insurer may not be able to terminate a long-term insurance contract, it is crucial to adjust the premium. However, it is also necessary to ensure that the price adjustment clauses are transparent for customers. The specific importance of differences between the unfairness control regimes is therefore relevant for price adjustment clauses.

iv) Claims settlement

311. Contract law rules on claims handling may have an impact on the cross-border offer of motor insurance, although it should be noted that differences in regulatory requirements or industry codes of practices may also be a significant factor of cross border trade. In Italy, a motor liability insurer does not only have to pay for the damages *caused* by the insured, but by operation of law also has to pay for the own damage *suffered* by the insured if the latter so requires. Thus, the liability insurance is combined with an own-damage insurance. If the insurer, in such a case, wants to have recourse against the liable third party, this will only be possible up to pre-established limits even where the actual loss borne by the insurer was much higher.

312. In Austria there is a mandatory rule that if policyholders waive their right to ask for a replacement car, the premium is significantly reduced. This affects incoming insurers which see their premium reduced while they may not have the mutual advantages of the Austrian internal system[292].

313. In Spain, the law establishes that in case the payment of the insurance money is overdue or if a reasoned offer of compensation is not made within the three-months time limit laid down in the codified Motor Insurance Directive 2009/103/EC, the compensation will be increased by an annual interest rate equal to that of the legal interest rate at the moment in which it is paid, increased by 50%. Notwithstanding the above, once two years have elapsed since the occurrence of the insured event, the applicable interest rate may not be less than 20% per year[293].

292 See Section 21 (1) Austrian Motor Vehicle Liability Insurance Act 1994 as amended

293 See Art. 9 Real Decreto Legislativo 8/2004, de 29 de octubre, por el que se aprueba el Texto Refundido de la Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos a Motor.

Annex 1

EXPERT GROUP ON THE EUROPEAN INSURANCE CONTRACT LAW

Individual expert appointed in his/her personal capacity

Prof. Dr. Dr. h.c. mult.
Jürgen Basedow, Germany - co-rapporteur for section report on Life Insurance and rapporteur for the Final Report

Prof. Dr. Helmut Heiss,
LL.M., Switzerland, - rapporteur for section report on EU Law and Differences between national insurance contract

Mr. Piotr Czublun, Legal
Advisor, Poland

Individual expert appointed as representative of an interest

Dr. Jorge Pegado Liz,
Attorney at law, Portugal

Dr. Juan Bataller-Grau,
Catedrático de Derecho
Mercantile, Spain

Mr. Yannis Samothrakis,
Attorney at law, Partner,
Clyde & Co LLP., France/Greece, rapporteur for section report on The Impact of Differences in Insurance Contract Law Applicable to All Classes of Insurance on Cross-Border Insurance – part I

Prof. Jérôme Kullmann, France

Organisations

Associazione Nazionale fra le Imprese Assicuratrici, ANIA,
Association, Italy, represented by **Prof. Diana Cerini** - rapporteur for section report on Liability Insurance

The European Consumer Organisation, BEUC,
Association, EU, represented by **Jean-Paul Coteur**

European Federation of Insurance Intermediaries, BIPAR,
Association, EU, represented by **Dr. Svenja Richartz**

Council of Bars and Law Societies of Europe, CCBE,
Association, EU, represented by **Dr. Elisabeth Scheuba**

Fédération Française des Sociétés d'Assurances, FFSA,
Association, France, represented by **François Rosier**

Gesamtverband der Deutschen Versicherungswirtschaft e.V., GDV,
Association, Germany, represented by **Dr. Natascha Sasserath-Alberti**

Insurance Europe, Association, EU, represented by **Malene Bye Rasmussen**

Lloyd's Market Association, Corporate, United Kingdom, represented by **Kees van der Klugt**

Standard Life, Corporate, United Kingdom, represented by **Katie Paterson** – rapporteur on section report on Economic Facts and General Framework

The Law Society of England and Wales, Association, United Kingdom, represented by **Joanna Page** – rapporteur for section report on The Impact of Differences in Insurance Contract Law Applicable to All Classes of Insurance on Cross-Border Insurance – part II

European Association of Craft, Small and Medium-sized Enterprises, UEAPME,
Association, EU, represented by **Luc Hendrickx**

Unión Española de Entidades Aseguradoras y Reaseguradoras ,UNESPA,
Association, Spain, represented by **Nuria Castañer Carrasco** – rapporteur for section report on Motor Liability Insurance

Verbond van Verzekeraars,
Association, Netherlands, represented by Erik Schouten - co-rapporteur for section report on Life Insurance

Additionally, depending on the topic discussed during the meeting of the expert group, the organisations were also represented on an *ad hoc* basis by the following experts:

Associazione Nazionale fra le Imprese Assicuratrici, ANIA,
Association, Italy: **Chiara Stolfy, Pietro Negri**

The European Consumer Organisation, BEUC,
Association, EU: **Ursula Pachl, Yves Evenepoel, J.F. Biernaux**

European Federation of Insurance Intermediaries, BIPAR,
Association, EU: **Anne Dessous, Carlo Galan**tini

Council of Bars and Law Societies of Europe, CCBE,
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Fédération Française des Sociétés d'Assurances, FFSA,
Association, France: **Alexis Merkling**

Gesamtverband der Deutschen Versicherungswirtschaft e.V., GDV,
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Insurance Europe, Association, EU: **Carmen Bell, Frederik Vandenweghe**

The Law Society of England and Wales, Association, United Kingdom: **Pollyanna Dean, Joanna Kielty, Charles Gordon**

European Association of Craft, Small and Medium-sized Enterprises, UEAPME,
Association, EU: **Dora Szentpaly-Kleis**

Verbond van Verzekeraars,
Association, Netherlands: **Roger Koch, Ernst Pompen**